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No. _____

In The
Supreme Court of the United States
October Term, 1999

TERRY LYNN KING.

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Tennessee
at Knoxville

PETITION FOR WRIT OF CERTIORARI
with Appendix

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July, 1999

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

I. WHETHER, IN A CAPITAL CASE, WHEN THE STATE SUPREME COURT DECLARES AN AGGRAVATING CIRCUMSTANCE INVALID, THE CONSTITUTION REQUIRES CUMULATIVE ERROR ANALYSIS OF THE REMAINING AGGRAVATING CIRCUMSTANCES AND THE ENTIRE RECORD, IN A STATE IN WHICH THE JURY WAS INSTRUCTED THAT IT WAS TO WEIGH AND CONSIDER THE AGGRAVATING CIRCUMSTANCES IN A QUALITATIVE PROCESS.

II. CAN A STATE SUPREME COURT CURE A VAGUE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, WHICH VIOLATED MAYNARD V. CARTWRIGHT, SIMPLY BY CONCLUDING THAT THE CRIME WOULD HAVE SATISFIED A MORE CLEARLY DEFINED AGGRAVATING CIRCUMSTANCE?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Terry Lynn King, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Supreme Court of Tennessee entered April 12, 1999.

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OPINION BELOW

The Tennessee Supreme Court affirmed Mr. King's conviction and sentence of death on April 12, 1999. Terry Lynn King v. State of Tennessee, No. 03S01-9801-cr-00001 (Tenn. 4/12/99). App. 1-40.

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JURISDICTION

The Opinion of the Tennessee Supreme Court was entered April 12, 1999. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VIII

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STATEMENT OF THE CASE

On July 17, 1984, an indictment in Case Number 2126 in the Criminal Court for Knox County, Tennessee, was returned charging Terry Lynn King and a codefendant, Joe Sexton, with premeditated and felony murder in the shooting death of Diana Kay Smith. At trial, Mr. King was found guilty of felony murder and, on February 6, 1985, the foreman of the jury announced that Mr. King's sentence would be death by electrocution.

Tennessee is a weighing state, in which the jury is instructed to weigh statutory aggravating circumstances against mitigation proof in a qualitative analysis. The jury in Mr. King's sentencing hearing found four statutory aggravating circumstances:

(1) The defendant was previously convicted of one or more felonies, which involve the use or threat of violence.

(2) The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

(3) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another.

(4) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnaping.

State v. King, 718 S.W.2d 241, 248 (Tenn. 1986).

The jury, under Tennessee law, was not required to report the mitigating circumstances it found, although the trial court had found enough evidence to support charging the jury on a number of the statutory mitigating circumstances.

Mr. King's trial attorneys filed a direct appeal to the Tennessee Supreme Court. The Tennessee Supreme Court issued an opinion on July 28, 1986, finding a number of errors, but denying all relief to Mr. King. State v. King, 718 S.W.2d 241 (Tenn. 1986).

On direct appeal, the state conceded that error was committed in introducing evidence of Mr. King's juvenile convictions. Id. The Tennessee Supreme Court found the error to be harmless regarding the aggravating circumstance of prior violent offenses because Mr. King had adult convictions. Id. at 249.

On direct appeal, Mr. King also renewed his objection to a lack of definition regarding the heinous, atrocious or cruel aggravating circumstance. During the sentencing portion of Mr. King's trial, the trial judge had instructed the jury that it could consider the following aggravating circumstance:

> The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

The trial court failed to define **any** of the terms used in this aggravating circumstance and also failed to instruct the jury about any relationship between "heinous, atrocious, or

cruel" and "torture or depravity." The single quoted sentence was the entire instruction given by the trial court on this aggravating circumstance. On direct review, the Tennessee Supreme Court failed to consider Mr. King's challenge, ruling only on whether the term "torture" required further definition. It is unclear whether the Tennessee Supreme Court found error; however, the court found "no prejudice" to Mr. King. Id. at 249.

Mr. King squarely raised this issue at all stages of his post-conviction proceedings, including the challenge to the fact that the Tennessee Supreme Court did not rule on the issue on direct appeal. At the appeal of the post-conviction proceedings, the Tennessee Supreme Court simply reviewed the facts and reached its own conclusion that the aggravating circumstance applied. App. 14.

After his direct appeal, Mr. King's trial counsel assured him that a timely petition for a writ of certiorari would be filed with this Court. Due to a mistake in calculating a deadline, appointed counsel missed the deadline and was unable to file the petition.

Mr. King filed a Comprehensive Petition for Post-Conviction Relief in the Criminal Court for Knox County, Tennessee, on April 5, 1989. App. 41-87.

In the post-conviction petition, Mr. King described at length the constitutional grounds for reversal. Mr. King specifically included a challenge to the heinous, atrocious or cruel aggravating circumstances applied in Tennessee. App.

65, 68, 82. The petition also clearly alleged that the cumulative effect of the proceeding errors was to deny Mr. King due process and subject him to cruel and unusual punishment in violation of both the state and federal constitutions. App. 72 In Mr. King's Amendment No. 3 to the Petition for Post-Conviction Relief, he also pointed out that the Tennessee Supreme Court had disregarded or overlooked his challenge to the heinous, atrocious and cruel aggravating circumstance despite the fact that his challenge to this circumstance was plainly set forth in his direct appeal. App. 82.

After holding an evidentiary hearing, the state trial court denied post-conviction relief on October 31, 1995. These issues were presented to the Tennessee Court of Criminal Appeals which also denied relief. The Tennessee Supreme Court heard Mr. King's case on discretionary review and denied relief on April 12, 1999. App. 1-40. The Tennessee Supreme Court, like every court which has considered this case, found significant error. The Tennessee Supreme Court found that the aggravating circumstance that the murder was committed while the defendant was engaging in a listed felony was invalid, as applied to Mr. Kings case. App. 11. The court refused to grant relief, holding this error "harmless" and refusing to apply the doctrine of "cumulative error" to assess the effect of this error in the context of all the error in the record. App. 17-20. It is this Judgment upon which Mr. King seeks this Court's review on a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. IN A CAPITAL CASE, WHEN THE STATE SUPREME COURT DECLARES AN AGGRAVATING CIRCUMSTANCE INVALID, THE CONSTITUTION REQUIRES CUMULATIVE ERROR ANALYSIS OF THE REMAINING AGGRAVATING CIRCUMSTANCES AND THE ENTIRE RECORD, IN A STATE IN WHICH THE JURY WAS INSTRUCTED THAT IT WAS TO WEIGH AND CONSIDER THE AGGRAVATING CIRCUMSTANCES IN A QUALITATIVE PROCESS.

The Tennessee Supreme Court agreed with Mr. King that under Tennessee law, the aggravating circumstance that the murder was committed while the defendant was committing another felony could not be constitutionally applied to impose the death penalty in this felony murder case. App.11. The Tennessee Supreme Court refused to grant Mr. King a new sentencing hearing, however, finding that this error was "harmless."

In so doing, the Tennessee Supreme Court refused Mr. King's request to review the entire record using a cumulative error analysis in order to determine whether the invalid aggravating circumstance, coupled with the other

acknowledged error in the record, required a new sentencing hearing.

By rejecting cumulative error analysis, the Tennessee Supreme Court has made it impossible to adequately and accurately conduct constitutionally required harmless error analysis. See Clemons v. Mississippi, 494 U.S. 738 (1990). Without a comprehensive review of the cumulative effect of error in the record, it is impossible for a reviewing court to analyze the role of the jury and determine beyond a reasonable doubt that the jury would not have been influenced by the error.

The Tennessee Supreme Court held that:

> The crux of the . . . analysis is to review the record to determine whether the appellant's sentence of death is appropriate based upon the relative strengths and weaknesses of the valid aggravating circumstances and any mitigating circumstances.

App.18.

Thus, the Tennessee court is not engaging in constitutional harmless error analysis, but rather "reweighing" the evidence and substituting its judgment for that of a properly instructed jury. This Court has held that it is permissible for an appellate court to "reweigh" the evidence and impose a sentence of death, if under state law the appellate court has authority to decide whether a death sentence should be affirmed. Clemons v. Mississippi, 494 U.S. at 747. Tennessee, however, is not a state that allows

appellate reweighing. State v. Howell, 868 S.W.2d 238 (Tenn. 1993). Therefore, under Clemons v. Mississippi, Tennessee courts may not substitute their judgment for that of a properly instructed jury. Tennessee courts must conduct constitutional harmless error analysis.

By refusing to engage in a careful review of the record to determine the effect of cumulative error, the Tennessee Supreme Court is essentially refusing to make the required findings that would allow the Court to conclude beyond a reasonable doubt that the jury's verdict would have been the same in the absence of the error.

The Tennessee Supreme Court rejected Mr. King's request for cumulative error analysis because it refused to include in its analysis any issue that had been "previously determined or waived." App. 19. In other words, with regard to those issues that have been previously determined to be harmless error in isolation, the court simply refused to acknowledge that error in its purported harmless error analysis regarding the invalid aggravating circumstance. App.19-20. This is especially troubling in light of the fact that all of the other aggravating circumstances were tainted with error.

The seriousness of those errors which had been "previously determined or waived" emphasizes the importance of this Court's review in providing guidance on the proper way to conduct harmless error analysis under these difficult circumstances.

For example, the heinous, atrocious or cruel aggravating circumstance was used in clear violation of this Court's holdings in Godfrey v. Georgia, 446 U.S. 420 (1980) and Maynard v. Cartwright, 486 U.S. 356 (1988).

Similarly, the aggravating circumstance that Mr. King had prior violent felony convictions was tainted by the prosecution's introduction of evidence regarding two juvenile armed robbery convictions and a dismissed sexual assault charge.

Under the state supreme court's ruling, because these issues had been raised in prior proceedings, the court refused to examine the cumulative effect of these errors when viewed in the new light created by the court's finding regarding the invalidity of a felony murder aggravating circumstance in Tennessee.

As the Tennessee Supreme Court held, "we decline to give comprehensive review to any errors that were adjudicated on direct appeal or errors that the appellant could have, but did not raise until this proceeding." App. 20.

Mr. King's Case Presents an Important Issue of Federal Constitutional Law that Requires Further Guidance from this Court Because of the Frequency with Which this Situation Arises.

Unfortunately, many individuals on death row were sentenced to death using constitutionally infirm aggravating circumstances. This Court has been called upon several times

to clarify what methods of review are constitutionally acceptable when this situation arises. See Clemons v. Mississippi, 494 U.S. 738 (1990).

Whether the constitution requires cumulative error analysis is an important aspect of this review that has not received this Court's attention. The question, however, is crucial. Is the constitution offended when a court attempts to determine whether the use of an invalid aggravating circumstance was harmless error beyond a reasonable doubt when that court is required to blind itself to the cumulative effect of other error in the record just because some other court has addressed that error in the past and found it harmless in isolation?

This Matter Is Particularly Significant In Light of the Fact that in Tennessee, as in Other States, the Required Harmless Error Analysis Must Be Completed Without a Record of the Statutory Mitigating Circumstances Found by the Jury.

In Tennessee, it is unquestionably the province of the jury to decide whether the defendant should live or die. Although the discretion is guided, there is great discretion nevertheless.

Many courts, including this one, have recognized the essential difficulty involved in trying to perform harmless error analysis where the jury has to balance the **qualitative** nature of the aggravating and mitigating circumstances. As

Justice Blackmun pointed out in his concurring and dissenting opinion in Clemons:

> It would be the rare case, however, in which it could truly be said beyond a reasonable doubt that a sentencing decision would have been the same in the absence of an invalid aggravating circumstance. Harmless-error analysis would be especially problematic (if not impossible) *in Mississippi where the jury is not required to make written findings concerning mitigating circumstances*, and where the jury need not impose a death sentence even if aggravating factors outweigh those in mitigation.

Clemons v. Mississippi, 494 U.S. 738, 773 n.23 (1990) (BLACKMUN, concurring and dissenting)(emphasis added). The difficulty of conducting harmless error analysis under these circumstances can be contrasted with the scheme recently considered by this Court in United States v. Jones, ___U.S.___, No.97-9361 (June 21, 1999), in which the federal death penalty act had resulted in the jury reporting precisely the eleven mitigating circumstances it had found. (Slip op. at 29-30).

Because a number of state courts are being called upon to perform harmless error analysis without the benefit of knowing what mitigation the jury found, it is of utmost

importance to provide guidance to those courts regarding the scope of their inquiry.

The Tennessee Supreme Court Has Decided this Issue in a Way that Conflicts with Several United States Courts of Appeals.

In United States v. Rivera, 900 F.2d 1462, 1469-72, (10th Cir. 1990), the United States Court of Appeals for the Tenth Circuit, sitting *en banc*, directly addressed the issue of whether harmless error analysis requires the reviewing court to examine the cumulative effect of individually harmless errors in order to determine whether reversal is required. The court first noted that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." Id. at 1469. The court adopted cumulative error analysis and described this common sense approach as "an extension of the harmless error rule." Id. The court noted that a number of Circuit Courts of Appeal were in accord. Id., citing United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988); United States v. Smith, 776 F.2d 892, 899 (10th Cir. 1985); United States v. Canales, 744 F.2d 413, 430 (5th Cir. 1984).

The Tenth Circuit described a very simple and reasonable approach that has been rejected by the Tennessee Supreme Court:

> A cumulative-error analysis merely aggregates all the errors that individually have been found to

> be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.

Rivera, 900 F.2d at 1470.

More recent Court of Appeals decisions are also contrary to the Tennessee Supreme Court's approach. In United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996), the court specifically adopted cumulative error analysis:

> Where, as here, there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.

Id. at 1381, quoting United States v. Wallace, 848 F.2d 1464, 1476 (9th Cir. 1988).

The United States Court of Appeals for the Sixth Circuit also has adopted cumulative error analysis and held specifically that it applies in the habeas corpus context. See Lundy v. Campbell, 888 F.2d 467, 481 (6th Cir. 1989), cert. denied 495 U.S. 950 (1990); Walker v. Engle, 703 F.2d 959, 963 (6th Cir.), cert. denied, 464 U.S. 951 (1983).

See also, United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998)(noting that the cumulative error doctrine "provides than an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors)

can yield a denial of the constitutional right to a fair trial, which calls for reversal.")

Further Guidance Is Needed.

Because the Tennessee Court has rejected cumulative error analysis in the face of the weight of federal authority, review on a writ of certiorari is certainly warranted under this Court's rules and practices. S.Ct. Rule 10(b). Similarly, this is an issue of exceptional importance both because of the gravity of the issue and the unfortunate frequency with which individuals have been condemned using invalid aggravating circumstances. S.Ct. Rule 10(c).

The need for further guidance, however, is emphasized by the fact that no clear standard has been set out for how and when cumulative error analysis should be applied. The United States District Court for the Southern District of New York has noted this lack of consistency in canvassing the cases on cumulative error. Sanders v. Sullivan, 701 F. Supp. 1008, 1012 (S.D.N.Y. 1988)(finding that although the Second Circuit observes a "cumulative error" rule "[o]ur problem is that it does not tell us what that rule is: it did not set forth a test for determining when the cumulative effects of individual trial errors call for reversal of a conviction or habeas relief.")

II. A STATE SUPREME COURT CANNOT CURE A VAGUE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, WHICH VIOLATED MAYNARD V. CARTWRIGHT, SIMPLY BY CONCLUDING THAT THE CRIME WOULD HAVE SATISFIED A MORE CLEARLY DEFINED AGGRAVATING CIRCUMSTANCE.

Mr. King also respectfully asks this Court to grant review on a writ of certiorari in order to review the Tennessee Supreme Court's practice of discounting error under Maynard v. Cartwright by engaging in judicial legislation in finding that the facts would have fit a properly defined aggravating circumstance. Review is sought pursuant to the Eighth Amendment to the United States Constitutions's prohibition against cruel and unusual punishment and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

During the sentencing portion of Mr. King's trial, the trial judge instructed the jury that it could consider the following aggravating circumstance:

> The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

The trial court failed to define **any** of the terms used in this aggravating circumstance and also failed to instruct the jury about any relationship between "heinous, atrocious, or cruel" and "torture or depravity." The single quoted sentence

was the entire instruction given by the trial court on this aggravating circumstance. Even prior to Mr. King's direct appeal, the Tennessee Supreme Court acknowledged the infirmity of this instruction. State v. Williams, 690 S.W.2d 517, 533 (Tenn. 1985).

Although, Mr. King clearly raised the vagueness of this instruction on direct appeal, the Tennessee Supreme Court addressed only a claim regarding whether the trial court should have defined torture. State v. King, 718 S.W.2d 241, 249 (Tenn. 1986). On appeal the trial court's failure to define the term "torture" was summarily dismissed by the Tennessee Supreme Court. The Court stated that:

> The evidence in this case supports the aggravating circumstance, Tenn.Code.Ann. § 39-2-203(i)(5), as defined in State v. Williams, 690 S.W.2d 517, 532-33 (Tenn. 1985), as the defendant shot the victim in the head after she begged for her life and offered the defendant money to let her go. Furthermore, the remaining three aggravating circumstances were correctly charged and overwhelmingly supported by the evidence. *Under these circumstances*, there was no prejudice to the defendant by the failure to define "torture."

State v. King, 718 S.W.2d 241, 249 (Tenn. 1986)(emphasis added).[1]

The Tennessee Supreme Court's Practice Conflicts with Controlling Precedent From This Court.

Between the direct appeal and these post-conviction proceedings, this Court made it clear that such an instruction as that given in this case results in basically an uninstructed jury. Maynard v. Cartwright, 486 U.S. 356, 363 (1988). Maynard did not create a new rule, and thus states the law applicable to Mr. King's case. Stringer v. Black, 503 U.S. 222 (1992).

Nevertheless, in these post-conviction proceedings, the Tennessee Supreme Court found no error regarding this aggravating circumstance because "the evidence supports the jury's finding that the murder was especially heinous, atrocious, and cruel." App.14.

In Maynard v. Cartwright, this Court specifically rejected the Oklahoma court's attempt to salvage its "heinous, atrocious or cruel" aggravator by engaging in independent review. The Court held that for a reviewing court to review the evidence simply to see whether it agrees with the finding of the jury is insufficient to cure the unfettered discretion the

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[1]The phrase "under the circumstances" is especially significant in light of the fact that a second aggravating circumstance has since been found to be inapplicable.

instruction gave to the jury. Maynard v. Cartwright, 486 U.S. 356, 363 (1988). Thus, the Tennessee Supreme Court's holding conflicts with the clear precedent of this Court.

Conflict with United States Courts of Appeals

The Tennessee Court's approach is also in direct conflict with the United States Court of Appeals for the Sixth Circuit on precisely this issue. In Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995), the Sixth Circuit held the Tennessee aggravating circumstance and any attempts to salvage it were constitutionally insufficient. At the Sixth Circuit, the Attorney General for the State of Tennessee conceded that "the trial court [ ] erred in two respects relating to the constitutional requirements of first degree capital murder but claim[ed] that the errors were harmless."[2] The second error, conceded by the state is the same error complained of here. The United States Court of Appeals for the Sixth Circuit concluded:

> *Second*, by instructing the jury at the sentencing hearing that it should impose the death penalty if it should find the crime to be "heinous, atrocious or cruel" (and not outweighed by any mitigating circumstance), the state trial court violated another line of cases holding that such an instruction is too vague and uninformative to properly guide the jury in reaching a death verdict. Maynard v.

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[2]50 F.3d at 382.

> Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (Oklahoma's "heinous, atrocious or cruel" aggravating circumstance too vague to constitutionally channel jury's discretion to impose death penalty); Richmond v. Lewis, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992) (unconstitutional "heinous, atrocious or cruel" aggravator taints sentencing process and requires remand to state court for resentencing).

50 F.3d at 383.

After reviewing the instruction given in Mr. Houston's trial, the Sixth Circuit held that:

> Under the cases cited in the opening section of this opinion, this instruction was constitutional error, and the State concedes the instruction to be erroneous in this case.
>
> Even if there were no other error in this case, we could not allow the death sentence to stand.

50 F.3d at 387. (Emphasis added).

Because the Tennessee Supreme Court's approach to this issue is merely to independently review the facts in support of this aggravating circumstance, this Court should grant certiorari to clarify the proper standard of review and to resolve the conflict between the state and federal courts on this matter.

The Tennessee Supreme Court's approach to the vagueness of Tennessee's "heinous, atrocious or cruel"

aggravating circumstance also directly conflicts with a recent case from the United States Court of Appeals for the Fourth Circuit on the same issue. In Smith v. Dixon, 996 F.2d 667, 675-76 (4th Cir. 1993), the court reviewed the North Carolina Supreme Court's procedure when its heinous, atrocious or cruel aggravating circumstance had been declared invalid. The North Carolina Supreme Court, like the Tennessee Court, had simply reviewed the facts and determined that the facts justified a finding of the circumstance. The Fourth Circuit found this procedure insufficient and remanded to the state courts for proper review under Clemons v. Mississippi, 494 U.S. 738 (1990). Mr. King respectfully suggests that this Court should take this opportunity to clarify the standards to be used on review when a state has applied a constitutionally infirm aggravating circumstance and to ensure state compliance with the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988).

CONCLUSION

Mr. King respectfully prays that this Honorable Court issue a writ of certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, Year 1998

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TERRY LYNN KING

Petitioner,

v.

STATE OF TENNESSEE

Respondent.

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Petition For A Writ of Certiorari

To The Supreme Court of Tennessee

at Knoxville

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APPENDIX

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IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED
April 12, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

TERRY LYNN KING	)	**FOR PUBLICATION**
Appellant,	)	**FILED:** April 12, 1999
v.	)	KNOX COUNTY
STATE OF TENNESSEE	)	Hon. Harry Eaton Colombo
Appellee.	)	NO. 03S01-9801-CR-00001
	)	(Post Conviction, Capital)

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OPINION

AFFIRMED

BARKER, J.

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OPINION

We granted this post-conviction appeal to review the appellant's conviction of felony murder and the sentence of death based, in part, on the felony murder aggravating circumstance. The appellant requests this Court to clarify the Howell harmless error analysis used in State v. Hines, 919 S.W.2d 573, 583-84 (Tenn. 1995), and to address whether the Howell analysis requires a comprehensive review of cumulative errors in the record. The appellant also alleges ineffective assistance of counsel and contends that his case should have been severed from his co-defendant's under Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

For the reasons that follow, we conclude that any Middlebrooks error in this case, for use of the felony murder aggravating circumstance, was harmless beyond a reasonable doubt. Although Howell requires us to review the record for factors that may have influenced the imposition of the death sentence,[1] we hold that such review need not incorporate a comprehensive analysis of alleged cumulative errors. We find no reversible error and affirm the judgments of the trial court and the Court of Criminal Appeals.

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[1] State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993).

BACKGROUND

The appellant's criminal history reveals a pattern of violent behavior that has ultimately lead him to a position on death row. In this case, the appellant and co-defendant Randall Sexton[2] were convicted of felony murder and aggravated robbery of Diana K. Smith.[3] The evidence at trial was that on July 31, 1983, the appellant and Ms. Smith spent the afternoon together drinking beer, ingesting hallucinogenic drugs, and engaging in sexual intercourse. At some point during the day, Ms. Smith accused the appellant of raping her. The appellant responded that "he knew what he would do," whereupon he forced Ms. Smith into the trunk of her own car and drove to Mr. Sexton's residence. With Mr. Sexton following in a separate vehicle, the appellant drove Ms. Smith to a remote location in Knox County. The appellant ordered Ms. Smith to get out of the trunk and lie on the ground. He then shot her at close range in the back of the head with Mr. Sexton's high-powered rifle.

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[2]Mr. Sexton was tried together with the appellant for the crimes against Ms. Smith. Mr. Sexton was sentenced to life in prison plus a term of 125 years for his convictions. His appeal is not now before this Court.

[3]The appellant was also convicted of aggravated kidnapping based upon the same criminal episode. The trial court granted a judgment of acquittal on that conviction.

After the two men disposed of the body, they took Ms. Smith's car and other items that she had on her person. The body was discovered several days later in the Asbury quarry in Knox County. During the police investigation, both the appellant and Mr. Sexton made written statements to the police implicating themselves in the crime.

At the sentencing phase of trial, the jury sentenced the appellant to death based upon four aggravating circumstances: (1) the murder was committed by the appellant while he was engaged in committing rape, robbery, larceny, or kidnapping of the victim; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the appellant; and (4) the appellant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person. Tenn. Code Ann. § 39-2-203 (i) (7), (5), (6), and (2) (1982).

Following his unsuccessful direct appeal to this Court,[4] the appellant filed a post-conviction petition[5] alleging, among other things, that he was convicted and sentenced to death

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[4]State v. King, 718 S.W.2d 241 (Tenn. 1986).

[5]The appellant filed his post-conviction petition under the pre-1995 Post Conviction Procedure Act. Tenn. Code Ann. § 40-30-101 to -124 (Repealed 1995).

based in part on an invalid felony murder aggravator, that his trial counsel were ineffective, and that his joint trial with Mr. Sexton violated Cruz v. New York. In addition, he argued that he was entitled to a new trial and/or a new sentencing hearing based upon cumulative errors in the record.

The trial court conducted an evidentiary hearing and dismissed appellant's post-conviction petition. The trial court found a Middlebrooks error based upon appellant's conviction of felony murder and the State's use of the felony murder aggravating circumstance. However, the court determined that the error was harmless in light of the three remaining valid aggravating circumstances. On the joint trial issue, the court found that even if Cruz v. New York applies retroactively, the joint trial with Mr. Sexton was harmless error based upon the overwhelming evidence of appellant's guilt. Lastly, the court found that the appellant failed to prove that his counsel were ineffective at trial or on direct appeal. The trial court found no reversible error and held that appellant's claim of cumulative error was without merit.

The Court of Criminal Appeals affirmed the judgment of the trial court. The intermediate appellate court determined, however, that there was no Middlebrooks error because the underlying felony used to support the felony murder conviction may have differed from the felonies found by the jury to support the felony murder aggravator. The court noted that the felony murder conviction was based upon

the kidnapping and murder of Ms. Smith. The possible underlying felonies listed to support the felony murder aggravator were kidnapping, rape, larceny, and robbery.

Relying in part on this Court's decision in State v. Hines, 919 S.W.2d 573, 583-84 (Tenn. 1995), the intermediate appellate court concluded that the appellant was in a class of death eligible offenders demonstrably smaller and more blameworthy than the class addressed in Middlebrooks. The court, therefore, held that the use of the felony murder aggravator was not error in this case.

DISCUSSION

In this post-conviction proceeding, the appellant has the burden of proving the allegations in his petition by a preponderance of the evidence. State v. Benson, 973 S.W.2d 202, 207 (Tenn. 1998).[6] The factual findings of the trial court are conclusive on appeal unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

I.

The appellant first contends that the Court of Criminal Appeals misapplied the principles announced in Hines, 919 S.W.2d at 583-84, to determine that there was no

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[6]Under the new post-conviction procedure act, petitioners have the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997).

Middlebrooks error. He argues that the court effectively created a new non-statutory aggravating circumstance that "the accused committed the murder in the course of committing multiple felonies."

It is now a well-known principle that when a defendant is convicted of first degree murder solely on the basis of felony murder, the use of the felony murder aggravating circumstance to support a death sentence, without more, fails to sufficiently narrow the class of death-eligible offenders. State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992).[7] The majority of the Court in Middlebrooks based that decision upon a determination that the felony murder aggravator contains language that is virtually identical to the statutory definition of felony murder.[8]

At the time of the killing in this case, the felony murder aggravator read as follows:

> (7) The murder was committed while the defendant was engaged in committing, or was an

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[7]There has been some question concerning whether the decision in Middlebrooks was required under the cruel and unusual punishment provision of the federal constitution. Following Middlebrooks, a majority of this Court has held that the Middlebrooks decision was based independently on Article I, section 16 of the Tennessee Constitution. State v. Bigbee, 885 S.W.2d 797, 816 (Tenn. 1994); Howell, 868 S.W.2d at 259 n.7.

[8]Justice Drowota and former Justice O'Brien dissented as to the holding in Middlebrooks. See 840 S.W.2d at 347-350 (Drowota, J., dissenting).

> accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Tenn. Code Ann. § 39-2-203(i)(7) (1982).[9]

In comparison, Tenn. Code Ann. § 39-2-202(a) (1982) defined first degree felony murder as "every murder ... committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb."

The duplicative language in the above provisions has served as the basis for finding Middlebrooks error in cases where the underlying felony used to support a felony murder conviction was also used to support the felony murder aggravator. In a case that followed Middlebrooks, however, this Court addressed for the first time whether it was error to rely on the felony murder aggravator when an additional or

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[9]The felony murder aggravator has since been amended to provide that, "[t]he murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any" of the enumerated felonies. Tenn. Code Ann. § 39-13-204(i)(7) (Supp. 1995).

different felony supported the aggravating circumstance, but was not the underlying felony for the felony murder conviction. State v. Hines, 919 S.W.2d 573 (Tenn. 1995).

The defendant in Hines was convicted of felony murder based upon the victim's death during the course of an armed robbery. Id. at 576. The jury sentenced the defendant to death based in part on the felony murder aggravating circumstance. Id. at 577.[10] The felonies relied upon to support the felony murder aggravator were robbery, larceny, and rape. Id. at 583. The Court in Hines reiterated concern for applying aggravating circumstances and any mitigating circumstances so as to narrow the class of death eligible offenders in capital cases. Id. at 583. A majority of the Court[11] determined, however, that when a felony not underlying the felony murder conviction is used to support the felony murder aggravator, there is no duplication, and hence the narrowing function is sufficiently performed. Id. The majority held that absent any duplication, there is no

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[10]The jury also found that the defendant had been previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person, and that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Id. (referring to Tenn. Code Ann. § 39-2-203(i)(2),(5) (1982)).

[11]O'Brien, Sp., J. wrote for the majority, concurred in by Anderson, C.J., Drowota and Birch, J.J. Former Justice Reid dissented. See Hines, 919 S.W.2d at 584-88 (Reid, J., dissenting).

constitutional prohibition against the use of the felony murder aggravator to support the imposition of the death penalty for a felony murder conviction. Id.

The majority in Hines noted that duplication may have occurred in that case since armed robbery was the basis for the felony murder conviction and was also included for the jury's consideration of the felony murder aggravator. Id. The majority, therefore, conducted the harmless error analysis under Howell to address the possible Middlebrooks error. See Hines, 919 S.W.2d at 583-84.

The appellant's case is remarkably similar to the circumstances in Hines. The appellant was convicted of felony murder based upon his act of killing Ms. Smith during the course of a kidnapping. The felonies relied upon to support the felony murder aggravating circumstance were kidnapping, rape, larceny, and robbery.

The Court of Criminal Appeals relied on Hines to address whether the use of the felony murder aggravator violated Middlebrooks. The court properly noted that the jury may have relied on the felonies of rape, larceny, and robbery to impose the felony murder aggravator, which would have avoided any duplication problem under Middlebrooks. However, the court went further to conclude that there was no Middlebrooks error since the appellant was engaged in multiple felonies at the time he killed Ms. Smith. According to the court, the appellant was in a class of death-eligible

offenders smaller and more blameworthy than the class at issue in Middlebrooks.

We agree with the Court of Criminal Appeals that the appellant is a death eligible offender. However, to the extent that the court found no Middlebrooks error, we must respectfully disagree. As discussed in Hines, the mere fact that multiple felonies were listed by the State to support the felony murder aggravator does not eliminate the possible duplication error under Middlebrooks. Where, as in the instant case, there is no clear showing of which felonies the jury considered to impose the felony murder aggravator, we cannot presume that no Middlebrooks error occurred. In appellant's case, the jury may have relied on the kidnapping felony in part to convict the appellant of felony murder and to find the felony murder aggravating circumstance. If that occurred, then the use of the felony murder aggravator is error under Middlebrooks.

On the premise that the jury improperly relied on the kidnapping felony at sentencing, we shall conduct a Howell harmless error analysis. The Howell analysis requires us to determine beyond a reasonable doubt whether the appellant's sentence would have been the same had the jury given no weight or consideration to the felony murder aggravating circumstance. 868 S.W.2d at 260-62. It is important to examine the entire record for the presence of factors which potentially influenced the sentence imposed. These include,

but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecution's argument at sentencing, the evidence admitted to establish the felony murder aggravator, and the nature, quality, and strength of any mitigating evidence. Id. at 261.

Our examination of the record in accordance with the foregoing principles demonstrates that the use of the felony murder aggravator, if error, was harmless beyond a reasonable doubt. The remaining three aggravating circumstances were properly applied and strongly supported by the evidence.[12] First, there is no dispute that the appellant has prior felonious convictions that involve violence or threat of violence to the person. See Tenn. Code Ann. § 39-2-203(i)(2) (1982). In 1983, the appellant was convicted of felony murder and aggravating kidnapping based upon a criminal episode in Grainger County. Moreover, he was convicted of assault with intent to commit aggravated kidnapping for criminal conduct in Knox County that occurred only three days after the murder of Ms. Smith. The appellant argues that the (i)(2) aggravator was somehow tainted by the State's introduction of his juvenile convictions at the sentencing hearing. We

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[12]It is important to note that under the law in effect at the time of this trial, a jury could have imposed a sentence of death upon finding only one aggravating circumstance beyond a reasonable doubt, so long as there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance. Tenn. Code. Ann. § 39-2-203(g) (1982). In this case, the jury found four aggravating circumstances.

disagree. As this Court determined on direct appeal, the introduction of the juvenile records, while improper, had no bearing on the outcome of appellant's trial. His prior convictions as an adult reflect complete disregard for human life and strongly support the (i)(2) aggravator. The use of the juvenile record was harmless, and the (i)(2) aggravator was properly used to impose the death sentence.

Second, as the appellant admitted both before trial and at the sentencing hearing, he kidnapped and murdered Ms. Smith to avoid an allegation and possible charge of rape. See Tenn. Code Ann. § 39-2-203(i)(6). The evidence at trial reflected that the appellant spent the afternoon with Ms. Smith drinking alcohol, ingesting drugs, and having sexual intercourse. At some point, Ms. Smith asked the appellant why he had raped her. There is no dispute that appellant's subsequent criminal conduct against Ms. Smith was a reaction to Ms. Smith's accusation.

The appellant nevertheless contends that the (i)(6) aggravator was tainted by the testimony of appellant's ex-girlfriend, Lori Eastman Carter. Ms. Carter testified during the guilt phase that the appellant had previously assaulted her and attempted to kill her. On direct appeal, this Court determined that the testimony should have been excluded as irrelevant, but that any error was harmless beyond a reasonable doubt. The appellant now claims that the testimony improperly served as the factual basis for the (i)(6)

aggravator. We disagree. The appellant's own admissions fully support the aggravator without any consideration of Ms. Carter's testimony. There was no error in the jury's finding of that aggravator.

Third, the jury found that the murder was especially heinous, atrocious, and cruel in that it involved torture or depravity of mind. See Tenn. Code Ann. § 39-2-203(i)(5). The appellant argued on direct appeal and contends now that this aggravator is invalid because the trial court did not define "torture." In the direct appeal, this Court held that there was no prejudicial error in the trial court's charge on the (i)(5) aggravator. The appellant offers no valid reason why that determination should be disturbed now.

As the Court of Criminal Appeals noted, the evidence supports the jury's finding that the murder was especially heinous, atrocious, and cruel. The appellant kept Ms. Smith trapped in the trunk of her own car for at least forty-five (45) minutes before the shooting. After driving to the remote wooded area, the appellant ordered Ms. Smith to get out of the trunk and lie face down in the weeds. The appellant had the rifle in his possession and began placing brush on top of Ms. Smith. She begged him not to shoot her and offered money to spare her life. When she asked about her fate, the appellant responded that other guys were coming to have sexual intercourse with her.

The appellant ordered Ms. Smith to look away from him while she was lying in the weeds. He then shot her at close range in the back of the head. We agree with the courts below that the manner of Ms. Smith's death involved severe mental pain and anxiety as contemplated by the (i)(5) aggravator and as defined by this Court in State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985).

The next step under the Howell analysis is to review whether the prosecution placed undue emphasis on the felony murder aggravator during the closing argument at sentencing. The record reflects that the prosecution referred to four aggravating circumstances during his closing argument. He emphasized the manner in which the jury was to consider and weigh the aggravating circumstances together with any evidence of mitigation. In briefly discussing the aggravators, the prosecution mentioned the felony murder aggravator only once in the context of the closing argument. No more weight or emphasis was given to that aggravator than was given to the other three aggravating circumstances.

Moreover, aside from evidence at the guilt phase of trial, no additional evidence was submitted by the prosecution to establish the felony murder aggravator. At the sentencing hearing, the prosecution presented evidence only of appellant's previous convictions in Grainger County and Knox County. Therefore, we conclude that the prosecution

did not rely unduly or introduce improper evidence concerning the felony murder aggravator at sentencing.

Lastly, under Howell, we must review the nature, quality, and strength of any mitigating evidence in appellant's case. At the sentencing hearing, the appellant relied on four mitigating circumstances: (1) the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance; (2) the victim was a participant in the appellant's conduct or consented to the act; (3) the appellant was only twenty-one years old at the time of the crime; and (4) the capacity of the appellant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. Tenn. Code Ann. § 39-2-203(j)(2), (3), (7), (8) (1982).

The appellant emphasized the detrimental effects of alcohol abuse and mind altering drugs, such as LSD and quaaludes. There was evidence that the appellant had been taking those substances on the day of the murder. Also, the appellant presented evidence of his social history through his own testimony and the testimony of family members, a childhood friend, and a guidance counselor from his former high school. The evidence showed that the appellant suffered emotional trauma and became involved in excessive drug use

at an early age, following the death of his father. By the age of fourteen, the appellant was a regular user of cocaine, valium, and alcohol. He had a poor academic record during his school years and he dropped out of high school after failing the ninth grade.

The jury considered the above evidence and found beyond a reasonable doubt that it did not outweigh the strong showing of aggravating circumstances. After our independent review of the record, we are confident that the weighing of the mitigating evidence against the three remaining aggravators would have resulted in the same sentence of death. Accordingly, we conclude that appellant's sentence of death would have been the same had the jury given no weight or consideration to the felony murder aggravator and affirm the capital sentence.

II.

We shall next address whether the Howell analysis requires a comprehensive review of the cumulative effect of errors in the record, including errors that have already been previously determined, or waived, on direct appeal. The appellant contends that there are numerous "harmless" errors in the record, that when considered cumulatively and in the context of Howell, render his death sentence fundamentally unfair and invalid.

The appellant essentially asks this Court to conduct a harmless error analysis within the context of the Howell

harmless error analysis. This we decline to do. As we discussed above, the Howell analysis is conducted in cases where the jury's consideration of the felony murder aggravator constitutes error under Middlebrooks. The crux of the Howell analysis is to review the record to determine whether the appellant's sentence of death is appropriate based upon the relative strengths and weaknesses of the valid aggravating circumstances and any mitigating circumstances. We focus upon those circumstances, including the evidence used to support them, and determine beyond a reasonable doubt whether the sentence would have been the same had the jury given no weight or consideration to the felony murder aggravator.

In conducting the Howell analysis, courts must conduct an intensive review of the sentencing phase of trial to address the strength of the remaining aggravating circumstances, the nature, quality and strength of any mitigating evidence, the prosecution's argument at sentencing, and the evidence used to establish the felony murder aggravator. Assignments of error concerning the above factors are certainly relevant to the analysis under Howell.

We have conducted the Howell analysis in this case, addressing the alleged errors as to the remaining aggravating circumstances and other factors at sentencing. Based upon our review, we concluded beyond a reasonable doubt that the appellant's sentence would have been the same regardless of

the felony murder aggravator. That deliberate process has been approved by this Court in Howell and Hines to preserve the principles of individualized sentencing and to ensure that the appellant is a death-eligible offender. We find no reason to modify that analysis here.

The Howell decision was never intended to be a vehicle for reviewing or relitigating harmless errors or errors that have been previously determined or waived. Particularly, in post-conviction proceedings, courts must adhere to the limitations set forth in the Post-Conviction Procedure Act. Under the Act of 1989, a post-conviction hearing may extend to "all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (Repealed 1995).

A ground for relief is "'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1).[13] A ground for relief has been "'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a).

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[13]Section (b)(2) further provides that "[t]here is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived." Tenn. Code Ann. § 40-30-112(b)(2).

With those principles in mind, we decline to give comprehensive review to any errors that were adjudicated on direct appeal or errors that the appellant could have, but did not raise until this proceeding. Having determined that any sentencing error is harmless beyond a reasonable doubt, we again conclude that appellant's sentence of death should stand.

III.

The appellant next contends that the trial court's refusal to sever his case from Mr. Sexton's was prejudicial error requiring a reversal of his conviction under Cruz v. New York. Neither the appellant nor Mr. Sexton testified during the guilt phase of trial. The State, however, introduced into evidence a written confession made by each defendant during the police investigation. The trial court instructed the jury that each confession could be considered as evidence only against the confessor. The appellant argues that the admission of Mr. Sexton's confession violated his Confrontation Clause rights and constitutes reversible error under Cruz.

In the direct appeal, this Court upheld the admission of Mr. Sexton's confession based on the United States Supreme Court's decisions in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). The well-established rule from Bruton is that a defendant is

deprived of his Confrontation Clause rights when a codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In Parker, the Supreme Court modified the reach of Bruton where multiple defendants in a joint trial each have a confession that is introduced into evidence. The Court held that there was no Confrontation Clause violation under Bruton if the defendant's own confession recited essentially the same facts as the confession of the nontestifying codefendant. 442 U.S. at 73, 99 S.Ct. at 2140.[14]

Relying on the decision in Parker, this Court examined the confessions of both the appellant and Mr. Sexton and determined that they were "interlocking in the crucial facts of time, location, felonious activity, and awareness of the overall plan or scheme" of the killing. This Court, therefore, held that there was no Bruton violation and that the trial court did not err in denying the severance motion under Rule 14(c) of the Tennessee Rules of Criminal Procedure.

Following appellant's direct appeal, the United States Supreme Court decided the case of Cruz v. New York. In

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[14]A plurality of the Court in Parker reasoned that when the defendant has confessed to the crime, his case is already "devastated," so that the codefendant's confession "will seldom, if ever, be of the 'devastating' character referred to in Bruton," and impeaching the codefendant's confession on cross-examination "would likely yield small advantage." Parker, 442 U.S. at 73, 99 S.Ct. at 2139.

Cruz, the Court overruled the "interlocking" confession exception in Parker, reasoning that a codefendant's confession may be "devastating"[15] to the defendant and violative of the Confrontation Clause, even if it overlaps material facts in a confession made by the defendant. Cruz, 481 U.S. at 193, 107 S.Ct. at 1719. The Court, therefore, held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, ... the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." Id.

The appellant requests this Court to apply Cruz retroactively and to hold that the admission of Mr. Sexton's confession was constitutional error. Having carefully reviewed the progeny of cases under Bruton, we find it unnecessary to determine whether Cruz has retroactive application in this case. We are confident that even under the principles of Cruz, the admission of Mr. Sexton's confession was harmless beyond a reasonable doubt. Schneble v. Florida, 405 U.S. 427, 432, 92 S.Ct. 1056, 1060, 31 L.Ed.2d 340 (1972); Harrington v. California, 395 U.S. 250, 254, 89

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[15]The Court acknowledged that the codefendant's confession may actually enhance the reliability of the defendant's confession, and increase the likelihood of a conviction, where the two confessions are interlocking. Cruz, 481 U.S. at 193, 107 S.Ct. at 1719.

S.Ct. 1726, 1728-29, 23 L.Ed.2d 284 (1969); State v. Porterfield, 746 S.W.2d 441, 446 (Tenn. 1988), *cert. denied*, 486 U.S. 1017 (1988).

Mr. Sexton's written confession described his involvement in the killing from the time the appellant arrived at his residence with Ms. Smith locked in the trunk of her own car. In his confession, Mr. Sexton stated that the appellant was not going to release Ms. Smith because he was afraid "he would get in the same mess he got into with Lori [Eastman Carter]." Mr. Sexton admitted that the appellant took his high- powered rifle and that the two men drove separately out to a rural area in Knox County.

Before reaching their destination, both Mr. Sexton's vehicle and the vehicle driven by the appellant ran out of gasoline. In his confession, Mr. Sexton stated that he purchased five (5) dollars of gasoline for his car and five (5) dollars of gasoline in a separate container for Ms. Smith's car. The two men then drove a few miles up the road to a wooded area where the shooting was to occur. Mr. Sexton's confession describes in pertinent part:

> I left and took a funnel back to the Publix station and got me a Coke. I drove back down to the creek and drove into the wooded area. I saw the Camaro. It was stuck. I helped [the appellant] get it unstuck. Terry told me he had already killed the girl. Terry told me he laid the girl down on her

> stomach, and that while she was begging for him not to, he shot her in the back of the head. Terry told me he had covered the body up with some weeds.

Having carefully reviewed the written confessions made by the appellant and Mr. Sexton, we again note that they are substantially similar as to the facts and circumstances involving the murder. The appellant's confession, however, contains greater detail concerning the actual shooting. His confession provides in pertinent part:

> I pulled up in a wooded area and got stuck. I made the girl get out of the trunk. I had loaded the rifle and was pointing it at her. This [sic] was daylight. And I took the girl over into some weeds and made her lay down. She asked me what I was going to do, if I was going to kill her. I said, no, some more guys are going to screw you. I started covering her up with weeds. I told her this was so she couldn't be seen. I still had the gun. She was laying facedown. I picked up the rifle, held it approximately 3 feet from the back her head and shot her. [Mr. Sexton] wasn't there. We got the [victim's car] unstuck after [Mr. Sexton] came back. We then went through her personal belongings. I burned her pictures and I.D. and panties. [Mr. Sexton] walked over and

> looked at her. We started to leave, but decided to bury her. We started digging a grave next to the fence, but the ground was too hard, and we quit. We discussed what to do and decided to wrap her in a tent [Mr. Sexton] had in the back of his car, [sic] weight her and put her in the water. We decided we would do it the next morning.

It is clear that the admission of Mr. Sexton's confession into evidence would have constituted a Bruton violation under the rationale of Cruz. Nevertheless, the mere finding of a Bruton error in the course of the trial "does not automatically require reversal of the ensuing criminal conviction." Schneble, 405 U.S. at 430, 92 S.Ct. at 1059. In cases where the properly admitted evidence of guilt is overwhelming, and the prejudicial effect of the codefendant's confession is insignificant by comparison, then the improper admission is harmless beyond a reasonable doubt. Id. See also Porterfield, 746 S.W.2d at 446.

In this case, the objective evidence against the appellant was overwhelming. Jerry Childers, an acquaintance of the appellant, testified that the appellant came to his house on August 1, 1983, to inquire if he knew anyone who wanted to buy parts from a 1979 Camaro. Mr. Childers testified that the appellant confessed to having killed the woman who owned

the Camaro after she threatened to charge him with rape.[16] The appellant told Mr. Childers that he ordered the woman to get out of the trunk of her own car and to lie face down on the ground. The woman begged the appellant not to shoot her and offered him money. The appellant told Mr. Childers that he told the woman to turn away from him, and when she complied, he shot her in the back of the head.

Mr. Childers testified that a few days after talking to the appellant, he went to the location where appellant had said the shooting occurred. While walking in the area, he found an object with hair on it. He then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and to Agent David Davenport with the Tennessee Bureau of Investigation. The two officers met Mr. Childers at the professed shooting location and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search revealed bullet fragments and additional bone fragments.[17]

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[16]The appellant testified at the post-conviction hearing that he had told four people about the shooting, including Mr. Childers, before he was questioned by police.

[17]Additional evidence was provided by Agent Davenport and Tommy Heflin, a firearms examiner for the T.B.I. Agent Davenport testified that after the appellant made a statement, appellant took him and other officers to the place where the Camaro was hidden and to where he had hidden the vehicle's license plate. Also, appellant showed the officers where the shooting occurred and where he and Mr. Sexton had submerged the body in the quarry. Mr. Heflin testified that, based upon his

There is no question that the evidence of appellant's guilt was overwhelming even without consideration of the two written confessions. Considering the above evidence, coupled with appellant's properly admitted confession, any Bruton error was harmless beyond a reasonable doubt.

IV.

The appellant next contends that he received ineffective assistance of counsel at both the trial and the direct appeal. To prevail on a claim of ineffective counsel in this proceeding, the appellant must prove by a preponderance of the evidence that the advice given or services rendered by his counsel fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 903, 936 (Tenn. 1975). He must also demonstrate prejudice by showing a reasonable probability that but for counsels' error, the result of the trial proceeding would have been different. Strickland v. Washington, 466 U.S. 669, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996).

The appellant first claims that his trial counsel abandoned the defense theory of voluntary intoxication after having introduced it to the jury during the opening

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examination, at least two bullets had been fired from a rifle with the same firing characteristics as Mr. Sexton's rifle. He further stated that the intact metal bullet jacket found at the scene had been fired from Mr. Sexton's rifle.

statement.[18] Defense counsel Robert Simpson stated during his opening remarks that Ms. Smith willingly spent time with the appellant and appellant's cousin, Don King, on the day of the killing. While at Don King's trailer, the three drank large quantities of alcohol and ingested various mind-altering drugs, including LSD and quaaludes. Counsel stated that:

> We think the proof will show that whatever happened to Mrs. Smith, Mr. King's involvement was the product of an incredible quantity of intoxicants. And we think the proof will show that he cannot be held legally responsible for all of his actions to the degree the State would ask you, simply because of the vast quantities of intoxicants that he consumed. And the proof is going to be very clear on that point.

During the guilt phase of trial, proof of appellant's alcohol and drug consumption was admitted into evidence through the testimony of Jerry Childers[19] and the admission

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[18]The appellant was represented at trial by attorneys Robert R. Simpson and Joseph M. Tipton. Mr. Tipton has been a respected judge on the Tennessee Court of Criminal Appeals since 1990. He did not testify at the post-conviction hearing.

[19]Mr. Childers was an acquaintance of the appellant. He testified at trial that the appellant came to his house on August 1, 1983, to inquire whether he would purchase automotive parts from a 1979 Camaro. During his visit, the appellant told Mr. Childers that he had killed the owner of the vehicle after she threatened to charge him with rape. The appellant confessed the details of the killing to Mr. Childers, including the events

of appellant's police confession. Counsel Simpson testified at the post-conviction hearing that he did not call Don King to testify at the guilt phase because he strategized that Don King's testimony would hurt the defense.[20] Moreover, counsel stated that he decided to abandon the use of voluntary intoxication to defend appellant's actions after the testimony of appellant's ex-girlfriend, Lori Eastman Carter.

Ms. Carter testified for the prosecution, over the objection of defense counsel, that the appellant had attempted to kill her on October 13, 1982. According to Ms. Carter, the appellant hit her with a slapstick numerous times while repeatedly asking her "how it felt to be dying, so that the next woman he killed he would know how she felt." Ms. Carter testified that the appellant was sober when he attacked her with the slapstick.

Counsel Simpson testified at the post-conviction hearing that Ms. Carter's testimony was unexpected and devastating to appellant's case. Counsel had attempted to contact Ms. Carter for an interview before trial, but was unable to locate her. During appellant's case in chief, counsel attempted to rebut her testimony by calling appellant's cousin, James King, who testified that he and the appellant had taken Ms. Carter

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that preceded the crime.

[20]The appellant had apparently confessed his involvement in the murder to Don King.

to St. Mary's Hospital for treatment. In addition, the defense called Karen Greeg, Ms. Carter's sister, who testified that Ms. Carter could not be believed, even under oath. Counsel Simpson testified that the theory of voluntary intoxication was rendered futile after Ms. Carter's testimony. Counsel decided to challenge Ms. Carter's credibility during the guilt phase of trial and to rely on the evidence of intoxication during the sentencing.

The appellant relies on State v. Zimmerman, 823 S.W.2d 220, 224-26 (Tenn. Crim. App. 1991), to argue that the change in the defense theory constituted ineffective assistance of counsel. His reliance on that decision is misplaced. In Zimmerman, the defense theorized initially that the defendant was a battered and abused wife who had killed her husband in self defense. Id. at 224. Opening statements were made to the jury based upon that theory, and the defense planned to call the defendant as a witness. Id. at 224-25.

During the course of the trial, however, counsel advised the defendant to "shut down" the defense and to decline from testifying. Id. Zimmerman's counsel apparently reasoned that a conviction was inevitable, even though no surprise or new evidence had been presented by the State. Id. The Court of Criminal Appeals held that the sudden change in defense strategy constituted ineffective assistance of counsel under the circumstances of that case. Id. at 224. The court particularly noted that nothing changed or transpired during the course of

trial to warrant counsel's peremptory abandonment of the sound defense theory. Id. at 224, 226.

In appellant's case, Counsel Simpson testified that he revised the defense theory solely in response to the surprise testimony of Ms. Carter. Counsel objected to the introduction of her testimony, but was forced to deal with it after the trial court allowed it into evidence. Although we acknowledge that defense attorneys should strive to present a consistent theory of defense at trial, we must avoid judging the tactical decisions of counsel in hindsight. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). We have reviewed the circumstances from counsel's perspective at the time and conclude that the change in strategy does not rise to the level of ineffective assistance.

The appellant next contends that his counsel were ineffective in failing to obtain the assistance of mental health experts in a timely fashion. Counsel Simpson testified that he began the process of locating a mental health expert on January 9, 1985. At that time, the trial was set to begin on January 21, 1985, but was subsequently postponed to January 23, 1985, due to weather. Counsel obtained the services of Dr. Martin Gebrow, a psychiatrist, on January 15, 1985, and the doctor evaluated appellant on the first day of trial.[21]

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[21]Dr. Gebrow retained the services of a psychologist, Dr. David Mindes, to conduct neurological testing of the appellant. Those results were included in the evaluation report submitted to defense counsel by Dr.

Counsel subsequently made a strategic decision not to use Dr. Gebrow's evaluation because the appellant had initially lied about the circumstances of the murder[22] and because Dr. Gebrow opined that the appellant was an impulsive person who enjoyed hurting people.

Counsel Simpson testified at the post-conviction hearing that the defense was unable to obtain a second opinion due to the time constraints of trial. Counsel instead relied upon their own investigation of the appellant, including appellant's familial relations and his social history. Through the testimony of appellant's family and friends,[23] the defense presented evidence that the appellant suffered emotional trauma arising from the death of his father when appellant was eight (8) years old. The appellant became involved in

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Gebrow.

[22]At the time of the evaluation, the appellant claimed that Mr. Sexton was responsible for the death of Ms. Smith. The appellant and Mr. Sexton had fabricated this false version of the crime through a suicide letter that Mr. Sexton had left in his jail cell at the Fort Pillow State Prison. In the letter, Mr. Sexton confessed that he was the killer and that the appellant was not responsible for Ms. Smith's death. Mr. Sexton's suicide attempt failed, and both he and the appellant eventually admitted that the information in the letter was false.

[23]Defense witnesses in that regard included the appellant, his mother, his brother, a childhood friend, and a guidance counselor from appellant's former high school. Additional witnesses for the defense during the sentencing phase were Dr. Robert Booher and two correctional officers from the Fort Pillow State Prison.

harmful activities, including sniffing gasoline and alcohol abuse, at an early age. By the age of fourteen (14), he was a regular user of alcohol, LSD, cocaine, and valium. His scholastic record was poor and he dropped out of high school after failing the ninth grade.

Dr. Robert Booher, a medical doctor specializing in "addictionology," testified for the defense regarding the harmful effects of LSD and other hallucinogenic drugs. Defense counsel intended to use Dr. Booher's testimony together with evidence that the appellant had taken LSD and quaaludes on the day of the killing. The evidence supported part of the defense's mitigation theory that the murder was committed while the appellant was under an extreme mental disturbance and that appellant's capacity to appreciate the wrongfulness of his actions was substantially impaired by mental disease, defect or intoxication. Tenn. Code Ann. § 39-3-203 (j)(2), (8) (1982).

The appellant argues that the mitigating evidence could have been strengthened if his counsel had initiated the mental health evaluations earlier before the start of trial. He relies on the testimony of psychologist Dr. Pamela Auble, who conducted a mental evaluation of him after his convictions.

Dr. Auble testified at the post-conviction hearing that the appellant is an impulsive, immature person who has difficulty trusting other people. She opined that based upon appellant's experiences as a child, he also has a strong sense

of insecurity and often perceives other people as being hostile towards him. This impulsive and insecure nature, according to Dr. Auble, does not necessarily lead the appellant to act violently. However, she opined that when the appellant is confronted with a stressful situation, he is unable to think clearly before reacting. Dr. Auble further stated that appellant's impulsive behavior is exacerbated by his abuse of drugs and alcohol.

Based upon Dr. Auble's review of the facts in this case, she opined that the appellant unleashed a lifelong build-up of anger and hostility when Ms. Smith accused him of rape.[24] Dr. Auble testified that the appellant probably looked to Mr. Sexton for advice and then carried out the killing because of his impulsive nature and poor judgment.

The trial court reviewed Dr. Auble's testimony and determined that her evaluation provided little information in addition to that previously discovered by Dr. Gebrow. The trial court concluded, therefore, that even if defense counsel had initiated the mental health evaluations earlier, there was no proof that a more favorable report would have been obtained. We find no evidence to preponderate against that finding. Moreover, the record reflects that counsel presented

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[24]Dr. Auble testified that there were three reasons why the rape accusation triggered appellant's anger: (1) the appellant was fearful of rejection relating back to the death of his father; (2) his sister-in-law had accused him of rape when he was a juvenile; and (3) he had been involved in an abusive relationship with his ex-girlfriend, Lori Eastman Carter.

evidence through lay witnesses that was remarkably similar to the information provided by Dr. Auble. Appellant's counsel were not ineffective on this issue.[25] The appellant next contends that his counsel were ineffective in failing to thoroughly investigate Ms. Smith's past. According to appellant, counsel should have discovered public records concerning a prior false allegation of rape made by Ms. Smith.

Counsel Simpson testified at the post-conviction hearing that he investigated Ms. Smith's past and her involvement with the appellant before the killing. He stated that he did not rely heavily on Ms. Smith's past because he did not want the jury to focus on her as a victim. Counsel was aware that Ms. Smith had lived in McMinn County, but he had no information concerning her prior rape allegation.

We agree with the Court of Criminal Appeals that the prior rape allegation would not have benefited the appellant at trial. If anything, the information would have strengthened the prosecution's evidence of motive against him. Moreover, Ms. Smith's character was not at issue, and there has been no showing that information of her prior rape allegation would

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[25]We further note that portions of Dr. Auble's testimony supported the State's theory that the appellant committed the murder to avoid prosecution for rape. It is questionable whether defense counsel would have used that information even if it had been available.

have been admissible. Therefore, we cannot say that defense counsel were ineffective for failing to discover it.

The appellant next argues that his counsel were ineffective for failing to ensure the recording of all bench conferences during trial. Counsel Simpson testified that he mistakenly believed the bench conferences were being recorded throughout the trial. Only a few of the numerous bench conversations between counsel and the trial judge were preserved for the record.

The State concedes that counsels' failure to preserve all of the bench conferences was an instance of deficient performance. The State argues, however, that the appellant has not demonstrated any prejudice as a result of the deficiency. We agree. In order to demonstrate prejudice here, the appellant must show a reasonable probability that one or more of the unrecorded bench conferences resulted in an adverse ruling that constituted reversible error. The appellant has not satisfied that burden. Accordingly, this issue is without merit.

The appellant next contends that counsel should have called him as a witness at the pre-trial suppression hearing. Counsel Simpson testified that appellant's value and credibility as a witness was seriously undermined by his violent criminal history. Based upon that premise, counsel believed that any benefit from allowing the appellant to testify at the suppression hearing would have been

outweighed by the risk of consequences from the prosecution's in-depth cross-examination. Counsel testified that he wanted to make the prosecution wait until trial before taking a crack at the appellant.

As correctly noted by both the trial court and the Court of Criminal Appeals, counsel made a tactical decision not to call the appellant as a witness at the suppression hearing. We will not second guess that strategy on appeal with the benefit of twenty-twenty hindsight. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Hellard, 629 S.W.2d at 9. Counsel made a calculated decision, and there has been no showing of ineffectiveness.

The appellant next contends that his counsel were ineffective in failing to object to the admission of Mr. Sexton's suicide letter at the sentencing hearing. Mr. Sexton had written the letter in contemplation of suicide while he and the appellant were incarcerated at the Fort Pillow State Prison.[26] During the cross-examination of Mr. Sexton at the sentencing hearing, the State introduced the letter into evidence.

Mr. Sexton testified that he had discussed the contents of the letter with the appellant prior to writing it, and that the appellant had encouraged him to include a statement that he, Mr. Sexton, was responsible for Ms. Smith's death, not the

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[26]The letter was found at the prison facility after Mr. Sexton attempted to commit suicide.

appellant. Appellant's counsel relied on the letter in his closing argument to undermine Mr. Sexton's credibility and to demonstrate that the appellant had not used the letter as a defense. Counsels' strategy in part was to show that the appellant had admitted to the killing and was remorseful.

We agree with the Court of Criminal Appeals that counsel made a tactical decision to use the suicide letter, not only to attack Mr. Sexton's credibility, but to bolster the credibility of the appellant. Again, we decline to second guess the strategy chosen by defense counsel. Counsel knew about the suicide letter before trial and chose to use it during the sentencing phase to undermine the testimony of Mr. Sexton. The appellant further contends that his counsel were ineffective for failing to challenge on direct appeal the State's improper use of a dismissed juvenile charge during the sentencing phase of trial. At sentencing, the State cross-examined the appellant as to his criminal conduct as a juvenile.[27] His juvenile record revealed two armed robbery convictions and a dismissed charge of rape. Appellant's counsel challenged on direct appeal the admission of the two

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[27]As mentioned above, the State also introduced appellant's criminal record as an adult. The appellant had a prior conviction of felony murder, aggravated kidnapping, and joyriding. Also, he was convicted of assault with the intent to commit aggravated kidnapping based upon a criminal episode that occurred three days after the murder of Ms. Smith.

armed robbery convictions, but apparently omitted the State's use of the dismissed rape charge.

This Court has previously held that there is no constitutional requirement for an attorney to raise every issue on appeal. Campbell v. State, 904 S.W.2d 594, 596-97 (Tenn. 1995). See also Jones v. Barnes, 463 U.S. 745, 750-51, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). "Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel." Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). Counsel is given considerable leeway to decide which issues will serve the appellant best on appeal, and we should not second guess those decisions here. Campbell, 904 S.W.2d at 597.

Counsel Simpson testified that the defense carefully examined the trial record and listed every issue that might have merit on appeal. Counsel included a challenge on direct appeal to the State's use of the armed robbery convictions, and this Court held that admission to be harmless error. Under those circumstances, we cannot say that counsels' omission of the dismissed rape charge was ineffective.

CONCLUSION

Based upon the foregoing, we conclude that any Middlebrooks error in this case, for use of the felony murder aggravator, was harmless beyond a reasonable doubt. We have addressed the concerns of individualized sentencing

under Middlebrooks and Howell and conclude that the appellant was properly sentenced to death. Finding no reversible error, we affirm the judgments of the trial court and the Court of Criminal Appeals.

Unless stayed by this Court or other appropriate authority, the appellant's sentence of death shall be carried out as provided by law on the 16th day of August, 1999.

WILLIAM M. BARKER, JUSTICE

Concur:

Anderson, C.J.,
Drowota, Birch, Holder, JJ.

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION II

TERRY LYNN KING	)	
	:	
Petitioner	)	
	:	
v.	)	No. 33878
	:	
STATE OF TENNESSEE	)	(FILED 4/5/89)
	:	
Respondent	)	

COMPREHENSIVE PETITION FOR POST-CONVICTION RELIEF

Petitioner, Terry Lynn King, through counsel, pursuant to Tennessee Code Annotated §40-30-101 et. seq., moves this Court to grant him a new trial. In support of this petition, petitioner would show as follows:

(1) Petitioner's full name is Terry Lynn King. He is presently incarcerated in the Tennessee State Prison, Prison Number 103308, Section A West/Unit 6/7/3, Nashville, Tennessee 37219-5255.

(2) The indictment in this case was numbered 21126. Sentence was pronounced on March 8, 1985, before the Honorable Ray L. Jenkins for the offenses of first degree murder and armed robbery. The petitioner was sentenced to death by electrocution on the first degree murder charged and sentenced to 125 years for the offense of armed robbery.

(3) The petitioner is currently incarcerated by the Department of Corrections.

(4) Petitioner appealed the Judgment to the Supreme Court of Tennessee, on April 2, 1985, and asserted the following grounds:

> "1. Did the trial court err in denying Defendant's Motion to Declare the Tennessee Death Penalty Statute unconstitutional?
>
> 2. Did the trial court err in refusing to sever Defendant's trial from that of his co-defendant?
>
> 3. Did the trial court err in prohibiting Defendant's counsel from adequately questioning prospective jurors as to their understanding of the presumption of innocence and as to the meaning of a life sentence in prison?
>
> 4. Did the trial court err in failing to compel the State to disclose to Defendant the criminal record of the State's witness, Jerry Childers?
>
> 5. Did the trial court err in permitting the State to introduce into evidence and pass to the jury skull fragments, and then argue that the jurors had "held

a piece of the deceased in your hand" when it was irrelevant, cumulative and grossly prejudicial?

6. Did the trial court err in allowing the State to elicit evidence from its pathologist that the deceased's injuries were consistent with a hand grenade when such evidence was without foundation and unduly prejudicial?

7. Did the trial court err in failing to provide an adequate jury out hearing regarding the admissibility of the testimony of Lori Eastman Carter; in failing to exclude her testimony which was irrelevant, unreliable and grossly prejudicial; and in failing to grant a mistrial because to codefendant's statement mentioned a problem Defendant had with Lori?

8. Did the trial court err in refusing to instruct the jury on the lesser included offense of second degree murder?

9. Did the trial court err in refusing to grant a mistrial when it became apparent that the jury had begun its deliberations before the trial court had instructed the jury and submitted the case to the jury?

10. Did the trial court err by instructing the jury that it could consider all guilt phase proof during the penalty phase of trial for purpose of sentence?

11. Did the trial court err in permitting the State to elicit juvenile bad acts of armed robbery from Defendant when such use of juvenile misconduct is prohibited by law?

12. Did the trial court err in refusing to charge the jury of Defendant's requested sentencing instructions pertaining to mitigating and aggravating factors?

13. Did the trial court err in prohibiting Defendant's closing argument pertaining to the history and morality of the death penalty?

14. Did the trial court err in instructing the jury that it could consider rape and larceny in addition to armed robbery as an aggravating circumstance when it refused to charge larceny in the guilt/innocence phase and there was no evidence of rape?

15. Did the trial court err by instructing the jury that its verdict must be unanimous to impose a life sentence whereas T.C.A. Section 39-2-203 states that "no death penalty shall be imposed but upon a unanimous finding" but there is no statutory requirement that a life sentence must be imposed only upon an unanimous finding?"

(5) The Supreme Court of Tennessee affirmed the Judgment of the trial court on July 28, 1986.

(6) Petitioner was represented at trial and on appeal by Robert R. Simpson and Joseph M. Tipton of Tipton, Eshbaugh, Simpson and Varner, Suite 614, 531 South Gay Street, Knoxville, Tennessee 37902.

(7) An order was entered on May 28, 1987, appointing the law firm of Ritchie, Fels & Dillard, P.C. for the purposes of post-conviction relief.

(8) Petitioner King respectfully asserts that the convictions in case number 21126 are void because rights guaranteed him by the Constitution of the United States and the Constitution of the State of Tennessee have been abridged. In particular, petitioner avers that:

(a) Petitioner was denied his right to effective assistance of counsel in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Constitution of the State of Tennessee.

i. Trial counsel for Terry Lynn King petitioner did not apply for certiorari to the United States Supreme Court when the Supreme Court of Tennessee affirmed the Judgment.

ii. Trial counsel presented no evidence concerning the character or past actions of Diane Kay Smith.

iii. Trial counsel did not call witnesses pertinent to both the innocence/guilt phase and the sentencing phase.

iv. Trial counsel did not call Terry Lynn King to testify at the motion to suppress to the effect that he told David Davenport and Herman Johnson that he was represented by Tommy Hindman and that he wanted to confer with Tommy Hindman prior to giving nay statement.

v. Trial counsel determined not to call Terry Lynn King to testify at the motion to suppress to the effect that Terry Lynn King signed his rights waiver after he gave his oral statement.

vi. Trial counsel did not adopt an explicit theory of defense in the guilt/innocence phase of the trial relying upon voluntary intoxication as a defense to the charge of first degree murder.

vii. Trial counsel did not fully investigate Terry Lynn King's medical history, his history of drug abuse and his history and other trauma for use as evidence of mitigation.

viii. Trial counsel did not cross-examine Lori Eastman on the prior dismissed warrants which she had taken against Mr. King, about her prior relationship with Terry Lynn King, and about her decision to live with Mr. King after the incident she described at trial. [TR at 297-298].

ix. Trial counsel did not object to the introduction into evidence of the statement of Don King when King's prior statement was only used for impeachment purposes and would not otherwise be admissible into

evidence nor otherwise be permitted to be inspected by the jury. [TR 586].

x. Trial counsel did not renew his previous motion for a severance from Joe Sexton during the sentencing phase of the hearing.

xi. Trial counsel did not object to the State's cross-examination about Terry Lynn King allegedly raping Donna Marie Bowles when he had not been charged or convicted on any such offense and the fact of his conviction on a related charge was not already before the jury. [TR 687, 688].

xii. Trial counsel did not object to the State's cross-examination of Terry Lynn King on the details of the homicide which took place in Grainger County when the State had previously introduced evidence of this conviction as an aggravating circumstance and the underlying circumstances of that case were never in dispute in the case in question.

xiii. Trial counsel did not object to that portion of Mr. King's admission against interest which recited "when I was arrested by the Knoxville City Police . . ." when the arrest in the homicide case was made by the Sheriff's Department and the arrest made by the Knoxville City Police was for an offense which was not then in evidence before the jury. [TR 82 and 710; Exhibits 20 and 21].

xiv. Trial counsel did not appeal to the Supreme Court of Tennessee those convictions which were

returned on all counts other than the felony murder count on which Terry Lynn King received the death penalty.

xv. Trial counsel issued a notice to the effect that the defense intended to rely upon a mental defense prior to the time the defendant had been examined for such a condition.

xvi. Trial counsel did not call Don King and Eugene Thornhill on the question of voluntary intoxication in the defense case in the guilt/innocence phase of the trial.

xvii. Trial counsel did not object to cross-examination by the State of Terry Lynn King during the penalty phase of the trial about the details of the homicide in Grainger County, the attempted kidnapping in Knox County, and the incident involving Lori Eastman.

xviii. Trial counsel failed to exhaust Terry Lynn King's peremptory challenges and hence failed to preserve for appellate review any potential error which took place during voir dire.

xix. Counsel did not preserve the bench conference at which the trial court ruled that Terry Lynn King's juvenile convictions for robbery were admissible.

xx. Trial counsel failed to have Joe Sexton's statement fingerprinted to corroborate the fact that Terry Lynn King was shown Joe Sexton's statement and actually held it in his hand prior to making the decision to make a statement in his own behalf and that the fact that Sexton had made such

a statement served as an inducement to Terry Lynn King to make a statement of his own.

xxi. Trial counsel failed to object to cross-examination of Terry Lynn King by the State during the course of which the State displayed a photograph of the body of Diana Kay Smith to Terry Lynn King, despite the fact the picture was not in evidence, had no relevance to the trial of the case, and was used purely to gain psychological impact upon the witness.

xxii. Trial counsel failed to give notice of his intention to impeach Jerry Childress by means of his prior criminal record, even though counsel had been told about his prior criminal record well before trial.

xxiii. Trial counsel failed to use as evidence in mitigation of sentence testimony from members of the Knox County Sheriff's Department to the effect that Terry Lynn King, while being held as a prisoner, had been released from his cell to work with tools such as putty knives and hammers and that he had been an entirely trustworthy inmate for these purposes. State v. Sheffield, 676 S.W.2d 542, 553 (Tenn. 1984); Lockett v. Ohio, 438 U.S. 586 (1978).

xxiv. Trial counsel did not seek to obtain a wine bottle found at Don King's house which had Diana Kay Smith's fingerprints on it to serve as corroboration that Mrs. Smith had engaged voluntarily in the actions that ultimately led to her tragic death.

xxv. Trial counsel failed to have a complete physical and mental examination conducted of Terry Lynn King after he had been placed on notice that Terry Lynn King had suffered head injuries and had sniffed gasoline for a number of years.

xxvi. Trial counsel failed to object and failed to proffer that Terry Lynn King had not in fact ever been convicted for an offense involving rape of his sister-in-law. (TR 528-529).

xxvii. Trial counsel decided during the course of the trial itself that he would not rely upon the defense of insanity or mental condition, even though such a determination should have been made well in advance of trial. (TR 321, 385-387).

(b) Petitioner was denied his right to confront witnesses against him in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Constitution of the State of Tennessee. In that regard:

i. The trial court permitted the introduction of the pre-trial confession of Randall Joe Sexton, the co-defendant in case number 21126 in violation of Cruz v. New York, 481 U.S. ___, 95 L.Ed.2d 162, 109 S.Ct. ___ (1987).

ii. The statement of Randall Joe Sexton tended to inculpate Terry Lynn King and contained a reference to an

incident in Terry Lynn King's past which was irrelevant to the question of guilt or innocence in this case.

iii. This statement was further used in the sentencing portion of the trial, tending to exculpate Randall Joe Sexton and inculpate Terry Lynn King.

iv. The reference to the prior incident noted in Randall Joe Sexton's statement further prejudiced the petitioner in sentencing.

v. Thereafter the jury asked to inspect Joe Sexton's statement after it had begun its deliberations in the guilt-innocence phase of the trial. (TR 463).

(c) Petitioner was denied his right to due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections Eight and Nine of the Tennessee Constitution by virtue of the following:

i. The failure of the trial court to instruct on voluntary intoxication and the lesser included offense of second degree murder.

ii. The introduction of the defendant's juvenile record, including an accusation of the rape of his sister-in-law.

iii. The testimony of Lori Eastman Carter which in the words of the Supreme Court of Tennessee was "tenuous at best" and should have been excluded.

iv. The failure of the trial court to appoint a psychologist or psychiatrist for a full and complete evaluation after the defendant put his mental state at issue by filing a

Notice of Intent to Rely on Defense Based upon Mental Condition on December 28, 1984. See Ake v. Oklahoma, 105 S.Ct. 1087 (1985).

v. The cross-examination conducted by the State to the following effect:

1. The cross-examination of Imogene Haynes, a representative from Teen-Challenge, who was asked whether Terry Lynn King had told her that he had "taken a 30-30 rifle and been involved in the killing up in Grainger County of a solder" and "did he tell you that he was involved in driving a vehicle when a knife was placed at a girl's throat and she was . . ." [TR 608, 609].

2. The State's cross-examination of Terry Lynn King about whether on January 17, 1980, at approximately 4:00 a.m. in the morning, he was on drugs or alcohol when he committed an armed robbery with a sawed off shotgun when the details of such an offense were not properly in evidence. {TR 708].

3. The cross-examination by the State of Terry Lynn King about an armed robbery which took place on January 16, 1980, and whether he had been on drugs and alcohol that day when the details of such an offense were likewise not properly before the jury. [TR 709].

4. The cross-examination of the State of Terry Lynn King to the effect "You were the one that put the gun there and blew her apart where we've got part of her skull in here, weren't you" where the fact that part of the

deceased's skull was in the courtroom was irrelevant to the sense of the question and the language chosen was intended purely to inflame the jury over objection by defense counsel. [TR 716].

5. The introduction into evidence of a letter written by Joe Sexton to the effect that he was responsible for the death of Mrs. Smith, where in truth and in fact as Terry Lynn King had previously admitted, he, Terry Lynn King, was responsible for the death of Mrs. Smith and Joe Sexton's letter was irrelevant to any questions which were properly before the jury. [TR 806-Exhibit 82].

6. The introduction into evidence of Exhibit No. 76, a 32 caliber pistol, which had no bearing on the evidence in the case. [TR 719, 831-Exhibit 76].

7. The introduction into evidence through the testimony of Mr. Childress during direct examination by the State to the effect that Terry Lynn King had previously been to jail before and was not going back and that is why he killed Mrs. Smith. [TR 247].

8. The cumulative effect achieved by the introduction into evidence by the State, whether by cross-examination or otherwise, of details of offenses and alleged offenses involving Lori Eastman Carter, Donna Marie Bowles, Todd Millard, Terry Lynn King's sister-in-law and two armed robberies.

vi. The trial of Terry Lynn King was not severed from the trial of Randall Joe Sexton despite the self-

evidence, antagonistic defenses raised by both defendants in both phases of the trial.

vii. During voir dire, the State informed prospective jurors that there was extensive publicity concerning the murder and then proceeded to voir dire on it. (TR 116).

viii. During voir dire the prosecution asked a prospective juror whether the juror believed that the use of drugs by a victim justified blowing the top of the victim's head off, when the sole purpose of such a question was to inflame the prospective panel. (TR 156).

ix. During the course of final argument, the prosecutor made the following arguments which were objectionable and designed only to inflame the passions of the jury:

(1) The prosecutor argued there was a "bloody, destroyed body" when there was no evidence the body as a whole had in fact been destroyed. (TR 396) (See State v. Byerley, 658 S.W.2d 134, 139 (Tenn.Cr.App. 1983)).

(2) The prosecutor argued during the guilt phase "we know what Terry Lynn King is." Such a reference constitutes an improper characterization of the defendant. (TR 396) (See Lundy v. State, 521 S.W.2d 591, 595 (Tenn.Cr.App. 1974)).

(3) The prosecutor argued during the guilt phase of the trial that Terry Lynn King has a "sick

mind." (TR 397) (See Lundy and State v. Lee, 684 S.W.2d 655, 659 (Tenn.Cr.App. 1984)).

(4) The prosecutor argued during the sentencing phase about the facts of the Grainger County case as well as the circumstances that led to the death of Todd Millard even though Terry Lynn King was not on trial on that case. (TR 903) (See State v. Sheffield, 676 S.W.2d 542, 543 (Tenn. 1984)).

(5) The prosecution argued during the sentencing phase "and the law has provided for a way for society to protect themselves," thereby arguing by implication that the jury had a civic duty to protect society. (TR 904) (See Smith v. State, 527 S.W.2d 737 (Tenn. 1975); People v. Biondo, 256 N.W.2d 60 (Mich.App. 1977); See ABA Standards Relating To The Prosecution Function Section 5.8(d).

(6) The prosecution argued during the death penalty phase of the trial "but when, I ask you, are these individuals going to be made to take the responsibility for their actions, because they are not willing to accept that responsibility themselves. And you've heard Mr. Simpson get up and argue to you that the reason why no defense was put on is because we knew that Mr. King was guilty. Well, there is a plea that can be made at the first of the trial if Mr. King is guilty, and that plea is, when the indictment is read, guilty," thereby seeking to penalize Terry Lynn King for entering a plea of not guilty. (TR 943-944).

(7) The prosecution argued during the penalty phase of the trial ". . . . [b]ut each of these individuals wants to slip through the cracks of the system, because they won't accept the responsibility for their actions. They want you, for whatever reason, to not follow the law, to not accept your responsibility," thereby arguing that if the jurors returned a life sentence, they would not follow the law and would not accept their responsibilities as jurors to impose the death penalty. (TR 943-944) (emphasis added).

(8) The prosecution argued in the death penalty phase of the case "we ask you, is Terry Lynn King responsible for Diana Kay Smith's death? Is he responsible for Todd Millard's death? And are you going to hold him responsible to society for what he has done?," thereby seeking to inflame the passions of the jury by reminding them that Terry Lynn King had previously received a life sentence in the Grainger County case and that the jurors should "up the ante" by returning a verdict of death without properly balancing the conviction in the Grainger County case against all mitigating circumstances. (TR 944).

x. During the course of cross-examination of Terry Lynn King, the prosecution showed Mr. King a portion of the skull fragment and placed it before him while asking questions in an effort to affect his composure and, after proper objection by defense counsel, to the phrase "blown apart," the prosecution turned directly to defense counsel and inquired provocatively, in the presence of the jury, "Well, what would

you call it Mr. Simpson." (TR 715-716). Such line of inquiry and such a retort to defense counsel was calculated to disconcern the defendant during his testimony and to improperly inflame the passions of the jury.

xi. During the course of cross-examination of Terry Lynn King, the prosecution asked whether Joe Sexton said that they only reason he helped Terry Lynn King was because he was afraid King would tell on him about the Grainger County case involving Todd Millard, a question unfounded in fact which the prosecution withdrew after timely objection was made before the jury. (TR 718).

xii. The prosecution in the present case refrained from seeking an indictment in the present case and refrained from putting the present case to trial until after Terry Lynn King had been tried on a case involving Donna Marie Bowles and had entered a plea of guilty in Grainger County in an effort to insure that these convictions could be used as aggravating circumstances in the prosecution of the present case.

xiii. The prosecution introduced Terry Lynn King's statement about the aggravated kidnapping involving Donna Marie Bowles, despite the fact counsel had previously stipulated that the conviction in that case involved a crime of violence and his prior statement about that case could not be properly put before the jury.

xiv. The prosecution cross-examined the codefendant, Joe Sexton, with regard to the details of what

Terry Lynn King had allegedly done in the Grainger County killing, and subsequently introduced Sexton's statement about what took place in the Grainger County killing when the details of that offense were not properly before the jury. TR 813-816.

xv. The prosecution cross-examined Albert Shannon Fulton about an assault on Donna Marie Bowles at Kroger, despite the fact the details of that offense were not properly before the jury in the present case. TR 849-852.

xvi. Counsel failed to cross-examine Herman Johnson and David Davenport about their presence during the lengthy interrogation of Terry Lynn King which took place prior to the time he gave his statement in the present case, failing specifically to point out that in the course of their preliminary hearing testimony neither Detective Johnson nor Agent Davenport had ever sought to explain the length of the interrogation by referring to the need for them to leave the interrogation room to confer with the family of the victim.

xvii. Defense counsel failed to appeal the trial court's denial of specific instructions for each of the various non-statutory forms of mitigation which trial counsel had properly requested at the death penalty phase of the trial.

(d) Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, and Article I, Section 9 of the Constitution of the State of Tennessee, as well as the due process clause of the Fifth and Fourteenth Amendments to the

United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution, as well as his right to equal protection pursuant to the Fourteenth Amendment to the Federal Constitution.

i. At the time Terry Lynn King entered a plea of guilty in Grainger County on May 3, 1984, he was not represented by counsel in the present case and hence could not and did not receive any advice of counsel to the effect that his conviction in Grainger County on a plea of guilty could be used as important and powerful aggravating circumstances in his eventual trial in the present case in Knox County.

ii. At the time Terry Lynn King was questioned concerning his role in the Knox County murder case, he had retained counsel Tommy Hindman on another Knox County case. Despite this pre-existing attorney/client relationship, Mr. King was questioned on the Knox County case in violation of his Fifth and Sixth Amendment rights. See Arizona v. Roberson, 108 S.Ct. 1981 (1988).

(e) The Petitioner was denied his right not to suffer from cruel and unusual punishments pursuant to Article 8 and Article 14 of United States Constitution and Article 1, Section 16 of the Tennessee Constitution, as well as his rights to due process pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution, and equal protection of the laws pursuant to Article 14 of the United States Constitution in the following ways:

i. The failure of the trial court to define "aggravation" or "mitigation" or "aggravating" circumstances or "mitigating" circumstances and hence to provide appropriate guidance to the jury in evaluating the meaning of those terms.

ii. The failure of the trial court to specifically instruct the jury that it could consider the fourteen non-statutory mitigating circumstances which were specifically requested by defense counsel and which were referred to by the Court only as "any other mitigating circumstances you may find" rather than as specific non-statutory mitigating circumstances which it could consider. [TR 948].

iii. The use of the pattern jury instruction set forth on page 948 of the transcript to the effect:

> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt and said circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death.

without an explanation of the following:

1. What constitutes a "sufficiently substantial" mitigating circumstance to offset any aggravating circumstances the jury might find.

2. Whether the meaning of the word "substantial" is a qualitative or a quantitative matter.

3. Whether the balancing test to be conducted by the jury was a qualitative rather than a quantitative balancing test.

4. That the jury could place whatever weight it might deem appropriate on any of the aggravating or mitigating circumstances it might find.

5. That a single mitigating circumstance could outweigh many aggravating circumstances and vice versa.

iv. The cumulative effect of the preceding errors being to convince the jury that they needed more than one mitigating circumstance and that those circumstances needed to be "substantial."

v. The failure of the trial court to sua sponte sever the penalty phase of the trial for the two defendants, particularly in light of the fact the court instructed the jury on two mitigating circumstances concerning Randall Sexton, which inevitably were antagonistic to the interests of Terry Lynn King and avoidable upon a severance, to wit,

The court instructed the jury, in considering the mitigating circumstances surrounding Randall Sexton, that:

> 1. The defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor. [TR 952]
>
> 2. The defendant acted under extreme duress or under the substantial domination of another person. [TR 952].

The so-called other "person" was clearly and unmistakably Terry Lynn King and such mitigating instructions as to Randall Sexton inevitably increased the likelihood that the jury would find Terry Lynn King to be the principal and hence a fit subject for the death penalty, whereas in truth and in fact Terry Lynn King was entitled to a trial involving capital punishment free of any such suggestion by the court.

vi. The antagonistic nature of these two defenses was made increasingly apparent throughout the course of the trial in the following respects.

1. Counsel for Sexton argued the incriminating nature of Terry Lynn King's statement concerning Lori Eastman Carter before the State in fact made the same argument in the guilt-innocence phase. (TR 408, 433).
2. Counsel for Sexton plainly declared that "whether or not he (Sexton) was aiding another person . . ." (TR 472).
3. Counsel cross-examined King about what he was doing at Krogers. (TR 671-674).

vii. The inherent difficulty in trying both defendants together during the penalty phase was properly brought to the attention of the court by both counsel for King and counsel for Sexton. (TR 626, 629).

viii. Because it was necessary to attempt to mitigate the circumstances concerning Sexton's conviction, counsel for Sexton found it necessary to cross-examine King and to call witnesses against King in an effort to aggravate the sentence to be imposed on King in an effort to mitigate the sentence imposed on Sexton:

a. Counsel for Joe Sexton cross-examined Terry Lynn King about the underlying factual circumstances of the assault which took place on Donna Marie Bowles despite objection from counsel for King. (673-674).

b. Counsel for Sexton introduced into evidence a statement from Sexton to the effect that King had sought to elicit an exculpatory letter from Sexton in the event Sexton decided to commit suicide. (TR 820).

c. Counsel for Sexton called Albert Shannon Fulton to testify against King and to impeach him by proving that King was the principal offender when Fulton had previously informed King's counsel that he knew nothing about the facts of the homicide and where Fulton had previously been a defendant in the trial involving Donna

Marie Bowles. Hence counsel for Sexton was able to call a witness hostile to King because Sexton's counsel had previously known the witness in a joint trial with King. (TR 838-853).

d. Likewise, counsel for Sexton called Freddie Harold Parks, Jr. as a witness hostile to Terry Lynn King to prove that King had requested an exculpatory letter from Sexton prior to Sexton's suicide attempt. (TR 861-869).

e. Counsel for Sexton called Detective Herman Johnson to testify against King with regard to that portion of King's statement in which Diana Kay Smith asked why they had raped her and King said in response, "And at that time I knew what she was going to do and I knew what I was going to do." (TR 857).

ix. The inclusion, as an aggravating circumstance of a murder committed during a rape when in fact there was insufficient evidence to warrant such an instruction for the offense of rape. [TR 946].

x. The inclusion in the court's charge on aggravating circumstances that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" without in fact defining any of those terms or giving the jury any guidance as to the application of such terms to the acts involved in the present case in which Mrs. Smith died without physical torture of any kind.

xi. The failure of the trial judge to instruct the jury that if it could not reach a unanimous verdict on the death penalty or on the imposition of a life sentence, the automatic result of that deadlock would be a life sentence imposed by the court. [TR 954-955]. California v. Ramos, 463 U.S. 992 (1983).

xii. The use of the sentencing instruction which permitted the State to use the act of kidnapping for a conviction on felony murder and as an aggravating circumstance for the death penalty. [TR 946].

xii. The cumulative effect of all such errors in the death penalty phase of the present case meant that the jury's ultimate verdict was not narrowly guided as required by the mandate of the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976).

xiv. 39-2-203(c) of the Tennessee Code permits the court to instruct on any matter which it deems relevant to the punishment without guiding either the court or the jury as to what such items might be.

xv. T.C.A. Section 39-2-203(c) does not permit the admission of any evidence which has been obtained in violation of either the State or Federal constitution. The statements of Joseph Randall Sexton were used in both the guilt-innocence phase of the trial as well as for the cross-examination of Terry Lynn King prior to the testimony of Joseph Randall Sexton, and under these circumstances such statements were obtained and used in denial of Terry Lynn King's right to confront his accuser.

xvi. Death by electrocution in the State of Tennessee constitutes a physically cruel and inhuman punishment because of the mental and physical torture which the process of death by electrocution imposes upon the individual who dies in such a fashion.

xvii. The trial court dismissed a juror simply because she had reservations about the death penalty. (TR 154-156). Gray v. Mississippi, 481 U.S. 648 (1987).

xviii. The Tennessee death penalty statute is unconstitutional inasmuch as it permits convictions which were returned after the murder to be used as aggravating circumstances whereas other states do not permit the use of such subsequent convictions in aggravation.

xix. The trial court charged at the request of the State and at the beginning of the sentencing phase of the case that "the proof you heard in the first phase of this trial may be considered by you in this phase for the purpose of sentence, thereby incorporating into the jury's consideration

the statements of Terry Lynn King and Joe Sexton which were admitted in violation of Cruz v. New York. (TR 470).

xx. The trial court unduly restricted the testimony of Imogene Haynes on the question of the remorse exhibited by Terry Lynn King, the prosecution arguing before the jury that the testimony as to remorsefulness was "totally self-serving" and that there was a witness here (i.e., presumably Mr. King) who could testify to remorse. (TR 606).

xxi. The trial court instructed the jury that it must "consider all the statements made by the defendant, whether favorable or unfavorable to him, and you must not disregard any of them without good reason," thereby instructing the jury to consider Terry Lynn King's statement with regard to Lori Carter Eastman. (TR 453).

xxii. Despite instruction to the jury that it should consider all of Terry Lynn King's statements, the trial court did not instruct the jury on voluntary intoxication as requested by counsel and as described in Terry Lynn King's statement and other evidence.

xxiii. The trial court instructed the jury on the lesser included offense of simple robbery but did not instruct the jury on the lesser included offense of second degree murder, voluntary manslaughter and involuntary manslaughter despite a timely request by counsel. (TR 451-452).

xiv. The court permitted the exhibits to be passed to the jury after the argument and proof was over prior to the instructions of the court. (TR 443).

xv. The aggravating circumstances set out in the Tennessee death penalty statute at T.C.A. 39-2-203(i) to the effect that "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind," is unconstitutionally void for vagueness both as ratified by the legislature and as applied on the facts of the present case in that none of these ambiguous terms were defined either by the statute or the judge and the terms are not so common that a layman could be expected to understand and apply the. Adamson v. Ricketts, ___ F.2d ___ (9th Cir. 1988) (to be reported); see "The Especially Heinous" Aggravating Circumstance in Capital Cases -- the Standardless Standard." 64 N.Car.L.Rev. 941 (1986). State v. Williams, ___ S.W.2d ___ (May 20, 1985) (at page 26).

xvi. The trial court refused to permit the defendant to have a full physical and mental evaluation conducted in an effort to show the existence of mitigating circumstances relating to mental condition despite an appropriate request by counsel for such examination.

xvii. The trial court denied Terry Lynn King a possible defense in mitigation based upon mental condition.

xxviii. The trial court gave a jury instruction which in effect created a mandatory presumption that death is appropriate if an aggravating circumstance is present.

xxix. The trial court failed to give definitions of the terms contained in the aggravating circumstances which it permitted the jury to consider in determining the fate of Terry Lynn King.

xxx. The trial court's instructions to the jury failed to require the State to prove beyond a reasonable doubt that the total aggravating circumstances outweighed the total mitigating circumstances.

xxxi. The Tennessee death penalty statute codified at T.C.A. 39-2-203 is unconstitutional in the following respects:

1. The statute fails to require the jury to make specific findings as to the presence or absence of mitigating circumstances, hence limiting consideration of these circumstances by the jury as well as preventing effective appellate review.

2. The statute relieves the State of its burden of proof and shifts the burden to the defendant to show that mitigating evidence outweighs aggravating evidence.

3. The statute fails to provide an instruction on the standard of proof to be applied in the sentencing phase of the trial or specifying who has the burden of proof.

4. The statute permits inadmissible, non-probative and unreliable evidence to be used against the defendant during the sentencing phase.

5. The statute creates a presumption that death is the appropriate punishment whenever an aggravating circumstance is shown to exist.

6. The statute makes death mandatory when the aggravating circumstances outweigh the mitigating circumstances without permitting the jury to show mercy.

7. The statute is void for vagueness and overbreadth inasmuch as it fails to define the terms of the statutory aggravating circumstances and those terms fail to meaningfully separate those who receive the death penalty from those who don't.

8. The statute permits a felony murder to be used as an aggravating circumstance which automatically subjects the defendant to death, thereby subjecting the defendant to double jeopardy and thereby failing to offer the jury any guidance for determining whether death is proper in any individual felony murder case.

9. The statute does not permit the defendant to make the final argument in the penalty phase, hence precluding him from the last opportunity to plead for his life.

10. The statute fails to provide notice to the defendant of the State's intention to seek the death penalty and what aggravating circumstances the State will rely upon.

11. The statute fails to provide for adequate appellate review of proportionality of the capital defendant's death sentence.

12. Because there are inadequate criteria and procedures for conducting a proportionality review, the statute fails to provide effective proportionality evaluation of any individual death sentence.

13. T.C.A. Section 39-2-203(h) is unconstitutional inasmuch as it prohibits the jury from understanding the nature and effect of a non-unanimous verdict and inasmuch as telling the jury that its verdict must be unanimous is a fiction because no such unanimity is in fact needed for a life sentence and the fact that the statute requires the fiction does not make it any the more acceptable.

xxxii. The courts in the State of Tennessee have construed the Tennessee Death Penalty Statute in an unconstitutional manner in the following respects:

1. The courts have failed to delineate any objective and meaningful criteria for conducting proportionality reviews.

2. The death penalty has been approved in an arbitrary and disproportionate fashion and in a way that is inconsistent with other sentences imposed in similar cases in Tennessee.

3. The death penalty has been imposed on the basis of where the crime occurred in Tennessee, with the death penalty having been applied more frequently in East Tennessee than in other parts of the State.

4. The application of the felony murder rule to create a mandatory presumption of the elements of malice and

the intent to kill in capital death penalty cases as well as to provide an aggravating circumstance constitutes a denial of due process and equal protection.

xxxiii. The Supreme Court in the present case failed to conduct a proportionality review as required by law.

xxxiv. The Supreme Court of Tennessee was unable to conduct a proportionality review in the present as required by law because it did not have before it the Rule 12 information required by the rules of practice of the Supreme Court.

(f) Petitioner was denied his right to due process pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution, as well as the equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution in that both he and Joseph Randall Sexton participated in the same homicides. Joseph Randall Sexton was the principal in one homicide, Terry Lynn King was the principal in the second homicide, but because of the circumstances under which the present case was tried, Joseph Sexton received life imprisonment in both cases while Terry Lynn King was ultimately sentenced to death.

(g) The cumulative effect of the preceding errors was to deny Terry Lynn King due process and subject him to cruel and unusual punishment in violation of both the State and Federal Constitutions.

(9) That the petitioner has not previously filed a petition for post-conviction relief and has not previously presented these claims to a court.

(10) The petitioner requests an evidentiary hearing on each and every allegation contained herein.

(11) All records, documents, and testimony are public record, and therefore are not attached at this time.

(12) Counsel for Terry Lynn King requests permission to amend this petition after having had a suitable opportunity to investigate the entire case taken as a whole.

Respectfully submitted,
RITCHIE, FELS & DILLARD, P.C.
By: /s/ Charles W. B. Fels
CHARLES W. B. FELS
Attorney for Petitioner
606 W. Main Avenue
Knoxville, TN 37902
(615) 637-0661

I certify that a true and exact
copy of the foregoing was this
5th day of April, 1988, forwarded
to the office of the District Attorney,
168 City County Building, Knoxville,
Tennessee, 37902.

/s/ Charles W. B. Fels
CHARLES W. B. FELS

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

TERRY LYNN KING,	)	FILED 2/19/91
	:	
Petitioner	)	
	:	
v.	)	NO. 33878
	:	
STATE OF TENNESSEE,	)	JUDGE MARY BETH
	:	LEIBOWITZ
Respondent	)	

AMENDMENT TO PETITION FOR POST-CONVICTION RELIEF

Comes Terry Lynn King by and through his counsel pursuant to Tennessee Code Annotated, Section 40-30-115 and respectfully moves to amend the Petition for Post-Conviction Relief previously filed on his behalf by adding the following additional grounds thereto:

(1) The language of Tennessee Code Annotated, Section 39-2-203(g), the statute under which Mr. King was tried and sentenced, which requires that the jury "shall" impose death if it finds that mitigating circumstances do not

outweigh aggravating circumstances violates Article 1, Section 19 of the Tennessee Constitution in that it usurps the traditional powers of the jury, mislead jurors as to their duties and responsibilities, and, distorts the proper scope of the sentencing inquiry.

(2) Section 39-2-203(g)'s mandatory language is in violation of Article 1, Section 8, of the Tennessee Constitution that provides that no person shall be deprived of "life, liberty or property, but by the judgment of his peers, or the law of the land."

(3) To the extent that Section 39-2-203(g) constitutes a mandate to Courts and juries by the General Assembly as to how to adjudicate certain issues, this section violates the directions of Article 2, Sections 1 and 2 of the Tennessee Constitution.

(4) To the extent that the mandatory language in Section 39-2-203(g) commands how the jury shall weigh some evidence but not other matters, it violates Article 6, Section 9 of the Tennessee Constitution.

(6) To the extent that sentences of death are visited upon defendants in violation of constitutional guarantees, such sentences are cruel and unusual punishment as proscribed in Article 1, Section 16 of the Tennessee Constitution.

Respectfully submitted,

RITCHIE, FELS & DILLARD, P.C.

/s/ CHARLES W. B. FELS

CHARLES W. B. FELS
Counsel for Petitioner
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Knoxville, Tennessee 37901-1126
(615) 637-0661

I certify that a true and exact copy of the foregoing was this 19th day of February, 1991, forwarded to the Office of the District Attorney, Suite 168, City-County Building, Knoxville, Tennessee 37902.

/s/ CHARLES W. B. FELS

CHARLES W. B. FELS

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

TERRY LYNN KING,	)	FILED 1/14/92
	:	
Petitioner	)	
	:	
v.	)	NO. 33878
	:	
STATE OF TENNESSEE,	)	JUDGE MARY BETH
	:	LEIBOWITZ
Respondent	)	

AMENDMENT NUMBER 2 TO COMPREHENSIVE PETITION FOR POST CONVICTION RELIEF

Comes Terry Lynn King and cites as additional grounds for the reversal of his conviction in the present case the following:

1. The Court and the District Attorney excused prospective jurors who could not consider the death penalty by virtue of the free exercise of their religion. The defendant was thereby deprived of a fair cross-section of the community by the excusal of said jurors who constituted definable segments of this community.

Moreover such excusal constituted a religious test as defined by Article I, Section 4 of the Tennessee Constitution and therefore violated Article I, Section 6 of the Tennessee Constitution which states in pertinent part:

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

The Court and the State have therefore violated the defendant's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and to Article I, Section 3, Section 4, Section 6, Section 8, Section 9 and Section 19 of the Tennessee Constitution.

Respectfully submitted,
RITCHIE, FELS & DILLARD, P.C.

/s/ CHARLES W. B. FELS
CHARLES W. B. FELS
Attorney for Petitioner
Suite 300, 606 W. Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided to the office of the District Attorney for Knox County, Tennessee, by placing the same in the United States Mail, first-class postage prepaid, on this the 13th day of January, 1992.

/s/ CHARLES W. B. FELS
CHARLES W. B. FELS

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

TERRY LYNN KING,	)	FILED 1/4/93
	:	
Petitioner	)	
	:	
v.	)	NO. 33878
	:	
STATE OF TENNESSEE,	)	JUDGE MARY BETH
	:	LEIBOWITZ
Respondent	)	

AMENDMENT NUMBER THREE TO THE PETITION FOR POST-CONVICTION RELIEF

Comes Terry Lynn King and respectfully adds the following grounds at Item (8)(a) (page 4 - 7 of the original petition):

xxviii. Counsel failed to appeal the trial court's denial of the Motion to Suppress the statement given by Terry Lynn King.

xxix. Trial counsel failed to appeal the prejudicial and erroneous admission of impeachment evidence relating to a juvenile charge involving allegations of sexual misconduct, a charge which was ultimately dismissed.

xxx. Counsel announced in his opening statement to the jury in the first phase of the trial that he intended to call one Donald King to testify with regard to the defendant's intoxication but did not in fact call Mr. King during that phase of the trial and thereby undercut the defense of voluntary intoxication (State v. Zimmemman, 823 S.W.2d 220 (Tenn.Crim.App. 1991).

xxxi. Trial counsel did not obtain testimony from a qualified mental health professional about whether the defendant's commission of the present crime was a result of "intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment" as a statutory mitigating circumstance. T.C.A. § 39-2-203. Nor did counsel seek testimony from such a qualified mental health professional about the likelihood that the defendant would make an entirely successful adjustment to prison life in the event he received a life sentence.

The petitioner further respectfully adds the following grounds at (8)(c) (found at page 9 - 14 of the original petition):

xviii. The State's introduction of blood samples taken from Joe Sexton's automobile when the State knew or should have known that one or more of these samples related to the death of Todd Miller in Grainger County, not the death of Diana Smith in Knox County. (TR. 216, 396, 716).

xix. The State failed to provide the address of Lori Eastman Carter to defense counsel, despite having reason to

know that defense counsel sought to interview Ms. Carter prior to trial to determine the nature, scope and admissibility of any testimony which the State might seek to elicit.

The petitioner further adds the following ground at Item (d) (found on page 15 of the original petition):

iii. Terry Lynn King's admission against interest was involuntary in that it was obtained during the course of an interrogation which began at approximately 9:30 p.m. and concluded at 3:20 a.m., during the course of which he was interrogated by four different detectives in the presence of an armed guard, during the course of which he ultimately provided the admission against interest as a result of intimidation and exhaustion.

The petitioner further adds the following grounds at Item (e) (found on page 16 - 24 of the original petition):

xxv. The Tennessee Supreme Court disregarded or overlooked the petitioner's challenge to the heinous, atrocious and cruel aggravating circumstance despite the fact that the petitioner's challenge to this circumstance was plainly set forth in his direct appeal.

xxvi. The Tennessee Supreme Court disregarded or overlooked one entire ground for appeal, despite the fact that it was plainly set forth on the face of the petitioner's direct appeal and his petition to rehear.

xxvii. The Tennessee Supreme Court found that there was no basis for an instruction on intoxication although the defendant's admission against interest which was relied upon

by the State in all other respects plainly set forth intoxication as a possible defense to first degree murder.

Respectfully submitted,
RITCHIE, FELS & DILLARD, P.C.

/s/ CHARLES W. B. FELS
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided to the Office of the District Attorney, Suite 168, City-County Building, 400 Main Avenue, Knoxville, Tennessee 37902, by hand-delivery the same on this the 4th day of January, 1993.

/s/ CHARLES W. B. FELS
CHARLES W. B. FELS

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

TERRY LYNN KING,	)	FILED 9/20/94
	:	
Petitioner	)	
v.	:	NO. 33878
STATE OF TENNESSEE,	)	JUDGE MARY BETH
	:	LEIBOWITZ
Respondent	)	

AMENDMENT NUMBER FOUR TO THE COMPREHENSIVE PETITION FOR POST-CONVICTION RELIEF

Comes the petitioner, Terry Lynn King, by and through counsel, and respectfully moves to make the following amendment to the Comprehensive Petition for Post-Conviction Relief previously filed in this case. The petitioner would respectfully move to amend as follows:

At item (c), on page 14, add the following language:

> xviii. The failure of the trial court to give a constitutionally adequate instruction on the definition of "reasonable doubt" for the guilt/innocence portion and sentencing portion of the trial. This violated the petitioner's rights

under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 8 & 9 of the Tennessee Constitution.

Respectfully submitted,

RITCHIE, FELS & DILLARD, P.C.

/s/ KENNETH F. IRVINE, JR.

CHARLES W. B. FELS
KENNETH F. IRVINE, JR.
Counsel for the Petitioner
Suite 300, 606 W. Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided to the Office of the District Attorney, Suite 168, City-County Building, 400 W. Main Avenue, Knoxville, Tennessee 37902, by hand-delivery of the same, this 20th day of September, 1994.

/s/ KENNETH F. IRVINE, JR.

CHARLES W. B. FELS
KENNETH F. IRVINE, JR.

UNITED STATES CONSTITUTION
ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION
ARTICLE XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
AUG 24 1999
CLERK

No. 99-158

In The

Supreme Court of the United States

TERRY LYNN KING,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I. Is the harmless error analysis conducted by Tennessee courts when an aggravating circumstance is found invalid constitutionally sufficient?

II. Does Tennessee's pre-1989 aggravating factor that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" violate the Eighth and Fourteenth Amendments of the United States Constitution?

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The opinion of the Supreme Court of Tennessee, published at 989 S.W.2d 319, was filed on April 12, 1999, and is attached as Appendix 1-40 to King's petition for writ of certiorari.

STATEMENT OF JURISDICTION

The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Terry Lynn King was convicted in 1986 in Knox County Criminal Court for felony murder in the perpetration of kidnapping and armed robbery. *State v. King,* 718 S.W.2d 241 (Tenn. 1986). King was sentenced to death by electrocution for the murder and to 125 years' imprisonment for the armed robbery. King's confession and other evidence introduced at trial showed that the defendant and the victim, Diana Kay Smith, spent the day of the murder together. The parties used drugs and had sex on three occasions. When the victim confronted the defendant and claimed he had raped her, the defendant forced the victim into the trunk of her car. *Id.* at 244. He enlisted the aid of a co-defendant, Randall Sexton, and told Sexton he had a woman in the trunk of the car and needed a rifle and a shovel. *Id.* Defendant and Sexton then proceeded with the victim to a secluded wooded area where the defendant pointed the rifle at the victim and forced

her to the ground. Defendant told the victim he was not going to kill her but that others were coming to have sex with her. *Id.* The victim begged for her life and offered the defendant money. He ordered her to turn her head and then fatally shot her in the back of the head. *Id.* The defendant and Sexton threw the victim's body in a quarry where it was discovered several days later. *Id.* at 244-45.

Following the guilty verdict, and in a separate proceeding, the jury found the presence of four aggravating factors. Specifically, the jury found (1) the defendant was previously convicted of one or more felonies, which involved the use or threat of violence; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another; and (4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping. *Id.* at 248. Further, the jury found that no mitigating circumstance outweighed the statutory aggravating circumstances and sentenced King to death for the murder.

King's convictions and sentences were affirmed by the Tennessee Supreme Court on direct appeal. *State v. King*, 718 S.W.2d 241 (Tenn. 1986). No petition for writ of certiorari was filed with this Court. King then instituted post-conviction proceedings pursuant to Tenn. Code Ann. § 40-30-101 *et seq.* alleging, *inter alia*, cumulative error and that the "heinous, atrocious or cruel" aggravator as presented to the jury was unconstitutionally vague.

The trial court held an evidentiary hearing and denied King's post-conviction petition. On appeal, the Tennessee Court of Criminal Appeals denied relief. The Tennessee Supreme Court granted discretionary review and also denied defendant's petition for post-conviction relief on April 12, 1999. *State v. King*, 989 S.W.2d 319 (Tenn. 1999). It is from this judgment the defendant seeks this Court's review on a writ of certiorari.

ARGUMENT

I. THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE TENNESSEE STATE COURTS WHEN AN AGGRAVATING CIRCUMSTANCE IS FOUND INVALID IS CONSTITUTIONALLY SUFFICIENT.

At petitioner's sentencing hearing, the jury sentenced the defendant to death based upon four aggravating circumstances: (1) the murder was committed by the petitioner while he was engaged in committing rape, robbery, larceny, or kidnapping of the victim; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner; and (4) the petitioner was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person. Tenn. Code Ann. § 39-2-203(i)(7),(5),(6), and (2)(1982). On post-conviction appeal, the Tennessee Supreme Court found that the felony murder aggravating circumstance codified at Tenn. Code Ann. § 39-2-203(i)(7)(1982), as

applied to petitioner, was invalid. Petitioner had been convicted of felony murder. Under the dictates of *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992), the court held that when a defendant is convicted of felony murder, the use of the felony murder aggravating circumstance, without more, fails to sufficiently narrow the class of death-eligible offenders. *Middlebrooks, supra*, was decided on Tennessee constitutional law and not based on any violation of federal constitutional law. *See State v. Bigbee*, 885 S.W.2d 797, 816 (Tenn. 1994) and *State v. Howell*, 868 S.W.2d 238, 259 n.7 (1993).

Tennessee is a "weighing" state. That is, once a jury has determined that a defendant is guilty of capital murder and found the presence of at least one statutory aggravating circumstance, the jury must weigh such factors against any and all mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890 (1980). However, the finding by a state appellate court that one or more of the aggravating circumstances is invalid does not automatically result in reversal of the sentence of death. In *Clemons v. Mississippi*, 494 U.S. 738 (1990), this Court approved two methods of appellate review by a "weighing" state. The appellate court can reweigh the aggravating and mitigating circumstances or undertake harmless error analysis. *Id.* at 754. Regardless of which method of review the appellate court chooses to adopt, the key requirement is the protection of individualized sentencing. *Id.*

Tennessee appellate courts have adopted the harmless error method in reviewing capital cases when one of the aggravating circumstances submitted to the jury is determined to be invalid. The preeminent case describing and detailing the requirements of Tennessee's harmless

error analysis is *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993). *Howell* adopted and expanded on the "beyond a reasonable doubt" standard of harmless error review set out by this Court in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Clemons v. Mississippi, supra*, specifically approved the *Chapman* "beyond a reasonable doubt" harmless error analysis as a permissible approach for state appellate courts to use in reviewing a capital sentence when one of the aggravating circumstances is determined to be invalid. *See Clemons*, 494 U.S. at 754.

The *Howell* harmless error analysis adopted by the Tennessee Supreme Court was based on this Court's announced standard of review to be applied to a capital sentencing jury's consideration of an invalid aggravating factor. "[T]he *Chapman* harmless error standard requires that an appellate court conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating factor." *Howell* at 260, *quoting Stringer v. Black*, 503 U.S. 222 (1992). The *Howell* standard requires a complete examination of the record for the presence of factors that potentially influence the sentence ultimately imposed.

> These include, but are not limited to, the number and strength of the remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

Howell at 261.

In petitioner's case, the Tennessee Supreme Court carefully reviewed the entire record and applied the *Howell* factors. The Court found beyond a reasonable doubt that petitioner's sentence would have been the same had the jury given no weight or consideration to the felony murder aggravator. *State v. King*, 989 S.W.2d at 326. Petitioner's assertion that the reviewing appellate court, in conducting such an analysis, is required to consider every conceivable error in a cumulative fashion is not what this Court has dictated as the standard of review. Such a review is not necessary to protect individualized sentencing or to meet the requirements of *Chapman* and its progeny.

Further, any consideration of cumulative error would be in violation of Tennessee's Post-Conviction Procedure Act which allows a post conviction hearing on "all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (Repealed 1995). As the Tennessee Supreme Court correctly held in petitioner's case, "*[H]owell* was never intended to be a vehicle for reviewing or relitigating harmless errors or errors that have been previously determined or waived." *State v. King*, 989 S.W.2d at 327.

Petitioner's argument that the Tennessee Supreme Court's application of harmless error analysis conflicts with that used by other United States Courts of Appeals is incorrect. (*See* Petition at 12-14). Petitioner's cited cases involve direct appeals of non-capital cases. Not one case cited by petitioner involves appellate court review of a

defendant's capital sentence when, as here, an aggravating circumstance has been found invalid on post-conviction appeal. In fact, petitioner cannot cite this Court to one instance wherein other United States Courts of Appeals are extending the *Chapman* "harmless beyond a reasonable doubt standard" to allow relitigation of direct appeal previously determined issues on post-conviction appeal. This issue does not warrant review.

II. TENNESSEE'S HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

The petitioner contends that Tenn. Code Ann. § 39-2-203(i)(5)(1982) is unconstitutional because it fails to sufficiently channel the sentencer's consideration of whether to impose the death penalty. This assertion is without merit.

This Court has held that an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and "provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court reviewed Georgia's version of this aggravator. Georgia's statute provided as an aggravating circumstance that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim. This Court concluded

that Georgia's aggravator was not unconstitutional on its face, and there was no reason to assume that the Georgia Supreme Court would adopt an unconstitutional construction of the aggravating circumstance.

Two years later in *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court concluded that Georgia's Supreme Court had applied the aggravator to that particular case in such a way that it could reasonably be construed to apply to any murder. In *Godfrey* there was no evidence of an aggravated battery being committed upon either of the victims, the State repeatedly informed the jury that torture was not involved, and there was no evidence demonstrating depravity of mind. *Id.*, at 432. Thus, this Court concluded that the Georgia Supreme Court's application of the aggravator to murders that were outrageously or wantonly vile, horrible, or inhuman, without finding that the actual killings met any of three listed circumstances of torture, depravity of mind, or aggravated battery of the victim, rendered the aggravating circumstance unconstitutionally vague as applied. *Id.*, at 432-433.

This Court expounded on the principles established in *Gregg* and *Godfrey, supra*, in analyzing Oklahoma's parallel aggravator in *Maynard v. Cartwright*, 486 U.S. 356 (1988). Oklahoma's aggravator simply provided that the killing had to be "especially heinous, atrocious or cruel." *Id.*, at 359. This Court held that an instruction on the bare terms of the statute alone was unconstitutionally vague, but as long as some narrowing construction was placed on the aggravating circumstance, it was constitutional. *Id.*, at 364-365. This Court used the example of requiring that aggravating circumstance to include some kind of torture or serious physical abuse in order to narrow its

application. *Id.*, at 365. But this Court specifically held that torture or serious physical abuse are not the only types of limiting circumstances that could be used; they were simply examples of limiting circumstances that would be constitutionally acceptable. *Id.*, at 365.

Under the standards set forth in *Gregg*, *Godfrey*, and *Maynard*, *supra*, Tennessee's aggravator at the time of the petitioner's offense was constitutional. At that time, Tenn. Code Ann. § 39-2-203(i)(5)(1982) provided as an aggravating circumstance that "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind." Thus, Tennessee's statute, unlike Oklahoma's statute in *Maynard*, provides a narrowing construction in the language of the aggravator itself. The jury could not apply the aggravator upon merely finding that the murder was heinous, atrocious or cruel; instead the jury had to find that it was heinous, atrocious, or cruel because it involved either torture or depravity of mind.

The Tennessee Supreme Court, in reviewing petitioner's renewed attacks during post-conviction proceedings, noted that it had addressed the identical issue on direct appeal and held that failure to define for the jury the terms "to aggravate" and "torture" as requested by the defendant was not error. Further, the court on direct appeal had reviewed the evidence and found that it supported the aggravating circumstance as defined by the court in *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985). *See State v. King*, 718 S.W.2d 241, 249 (Tenn. 1986).

The specific referral on direct appeal by the Tennessee Supreme Court to the *Williams* decision is important.

Clearly, the court applied a narrowed construction, limited to torture or depravity of mind, and found the evidence in petitioner's case clearly sufficient to meet this narrow definition. In *Williams*, the Tennessee Supreme Court conducted a detailed analysis of the "heinous, atrocious or cruel" aggravator; examined its application in other jurisdictions; defined specific examples of torture and depravity of mind; and reaffirmed its prior holdings that the aggravator requires specific evidence of torture or depravity of mind. *Williams* did not, as petitioner suggests in his petition, hold that all cases wherein the terms "heinous," "atrocious," "cruel," "torture," and "depravity of mind" were not defined was unconstitutionally vague. Rather, *Williams* held that the aggravator contains limiting language in the aggravator itself: heinous, atrocious or cruel is limited to cases involving torture or depravity of mind. *Williams* at 529.

Petitioner's argument that the State has conceded that the heinous, atrocious or cruel aggravator is unconstitutional is without merit. Petitioner relies on the decision in *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). In *Houston*, the State conceded that the aggravator, as applied to the facts in *Houston* only, was unconstitutional. *Id.*, at 387 (. . . and the State concedes the instruction to be erroneous *in this case.*" *Id.* (emphasis added). Certainly, the state has not and does not concede that the heinous, atrocious or cruel aggravating circumstance as drafted and applied in this case is unconstitutional.

In summary, because the self-contained limiting language found in the pre-1989 Tennessee heinous, atrocious or cruel aggravating circumstance instruction complies

with this Court's mandate in *Maynard*, the petitioner's vagueness challenge does not warrant review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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